IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 70
ARC 47/11

IN THE MATTER OF	an application without notice for search orders
BETWEEN	TELECOM NEW ZEALAND LIMITED Plaintiff
AND	DONALD SEAMUS LONG Defendant

Hearing: 22 June 2011
(Heard at Auckland)

Counsel: Richard McIlraith, counsel for plaintiff

Judgment: 22 June 2011

Reasons: 23 June 2011

REASONS OF JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The plaintiff has applied without notice to the defendant for a search order pursuant to Part 33 of the High Court Rules. This Court's power to make such orders in employment related proceedings is to be found in s 190(3) of the Employment Relations Act 2000 (the Act).

[2] I deal first with the plaintiff's claim that such an order should be made without notice to the defendant, what used to be called ex parte. It says that if the application were brought to the defendant's notice before being heard, there is a very substantial and significant risk that any order that might be made would be nullified by the defendant secreting or disposing of the documents to be searched for in view of the affidavit evidence about the background circumstances in which the order has been sought. Because of the particular circumstances disclosed by the affidavit

evidence and the general, if not inevitable, practice in such cases, I heard the application without notice to the defendant.

[3] The plaintiff has provided both an undertaking as to damages and appropriate information about its financial standing to meet an order for damages that the Court might make on that undertaking.

Relevant facts

[4] Donald Long was employed from 4 November 2010 in a senior executive Information Technology (IT) role with Telecom's division known as Gen-i. During that time he was responsible exclusively for a major account customer (which will be described as "AB"). The AB IT account is one of the largest in Telecom's portfolio.

[5] For about the last 18 months it has been known to Telecom that AB intends to put out to tender a substantial proportion of its telecommunications IT work from November 2011 when AB's current contract with Telecom concludes. Telecom intends to submit a tender for the AB business. Commensurate with the significant value of this work, preparation for tendering has already commenced and this has involved Mr Long. Indeed the evidence is that he has been integral to this planning and preparation and has, in the course of this, been the recipient of a substantial amount of sensitive commercial information that is confidential to Telecom.

[6] The plaintiff's evidence is that as an Enterprise Solutions Specialist with Gen-i's AB team, Mr Long has acquired significant knowledge of the technical aspects of AB's requirements and of the products and services which are best suited to its needs.

[7] Mr Long's employment agreement with the plaintiff contains express terms prohibiting disclosure by him of confidential information both during the course of and after that employment relationship. Additionally, the plaintiff's case is that Mr Long was bound contractually by the plaintiff's Code of Ethics for employees which provides independently for confidentiality of information. Further, Mr Long's employment agreement contains a three month restraint upon competitive economic

activity including employment, the application of which is already in dispute between the parties that is scheduled to be the subject of a mediation next Monday 27 June 2011.

[8] The plaintiff has given evidence of two instances which it says should cast doubt on Mr Long's honesty and integrity in dealing with confidential information. The first is said to be that when he began with Telecom he said he had sensitive strategic information, the property of his previous employer, that he was prepared to share with Telecom. The second instance deposed to, relates to Mr Long's treatment of confidential information in April 2011. It is said that he disclosed to Jeffrey Sandford, Telecom's Gen-i AB Client Executive, information about a competing bid for the AB tender process referred to earlier in this judgment. This was said to have been a copy of a confidential tender for AB business submitted by a competitor of the plaintiff, the contents of which would have enabled Mr Long and Telecom to have re-submitted a Telecom bid with the knowledge of the content of a competitive tender. There is documentary evidence supporting this allegation and, in particular, the way in which it was dealt with by Mr Sandford when it came to his notice. Mr Long is said to have received an employment warning for his part in that affair and the relevant AB employee is said to have been dismissed as a result of it.

[9] On 1 June 2011 Mr Long told Mr Sandford of an offer to him of employment by a Telecom competitor, Datacom, and his (Mr Long's) intention to accept that offer. Mr Sandford says that he told Mr Long that if he did accept he offer and resign from Telecom, the defendant would not be able to work out his notice period with Telecom and says that Mr Long appeared to have accepted this.

[10] On Friday 3 June 2011 Mr Long resigned formally, giving four weeks' notice and, at the same time, returned Telecom property including his company laptop computer. He was subsequently paid in lieu of working out his notice so that his employment with Telecom ended on 3 June 2011.

[11] Datacom competes directly with Telecom in the communications and IT field and, indeed, specialises in the Information Communication Technology (ICT) services that Telecom currently provides to AB and in respect of which it will tender

later in the year. Telecom considers that Datacom will be one of only a few companies that will also tender for the AB work.

[12] Telecom is concerned that the confidential information to which Mr Long has had access whilst employed at the company will give him or any person to whom he discloses that confidential information, a significant commercial advantage in relation to the AB tender.

[13] On 7 June 2011 Telecom wrote to Mr Long acknowledging his letter of resignation and reminding him of his confidentiality obligations. That letter sought undertakings from Mr Long that he would comply with those confidentiality obligations and the restraint clause in his employment agreement. There was a discussion between Messrs Long and Sandford about what the plaintiff acknowledges was an error in its earlier correspondence to Mr Long purporting to waive his requirement to give notice. In the course of this Mr Sandford is said to have clarified the position that whilst Mr Long would be paid for the period of his notice, he would not be required to work it out. Mr Sandford wrote again to Mr Long on 10 June 2011 seeking to clarify previous confusion and reiterating his request for undertakings. This produced a response from Mr Long's barrister challenging Telecom's refusal to waive the restraint period and initiating mediation about this issue. The undertakings requested by the plaintiff have not been given either by Mr Long or his counsel.

[14] A forensic IT expert, Michael Spence, has examined Mr Long's Telecom laptop that the defendant returned to the company at the time he finished work on 3 June 2011. Mr Spence's analysis shows that, in addition to a substantial number of (presumably personal) music files that were copied to an independent electronic storage device (ESD) and then deleted from the laptop, on the late evening of 2 June 2011 Telecom electronic files were transferred from its servers via Virtual Private Network (VPN) connection to Mr Long's Telecom laptop and thence to the same independent ESD and were then deleted from the laptop. These transfers and deletions were effected at the same time as the ESD was connected to the laptop.

[15] There is also evidence that on the following day, 3 June 2011, a file containing material copied from an electronic whiteboard was similarly downloaded to, and then deleted from, the laptop. This is very likely to have been strategic planning information that was confidential to the plaintiff. Mr Spence's view is that the independent ESD to which this information was transferred is Mr Long's personal hard disk drive. Mr Spence cannot confirm that this material was downloaded to the ESD from the laptop (or indeed subsequently from the ESD), without analysing the ESD.

[16] Although forensic analysis cannot yet determine other than that these documents were deleted from the laptop at or about the same time as the independent ESD was connected to it, there is said to be no reasonable conceivable explanation for someone in Mr Long's position doing so unless he had also copied those electronic records to his own ESD immediately before his employment with Telecom ended.

Causes of action

[17] The plaintiff's statement of claim alleges two causes of action. The first is breach by Mr Long of his restraint prohibiting competitive economic activity with Datacom. Although that cause of action is already the subject of contest between the parties and will be dealt with at a forthcoming mediation, the plaintiff does not rely on it in seeking this search order.

[18] The second cause of action is for breach of the contractual prohibition on misuse of confidential information by Mr Long. The plaintiff says that the evidence in support of its application for a search order both tends to confirm that Mr Long intends to breach that prohibition, if he has not done so already, and the subject matter of the search will be important, even vital, evidence in that regard.

[19] Although Mr McIlraith, as counsel for the plaintiff, has properly referred to possible defences by Mr Long, these potential defences relate to the restraint cause of action but not to the misuse of confidential information cause of action. The other possible defence that is identified (that Mr Long was unjustifiably dismissed by

Telecom because he was not permitted to work out his notice) will, if it relates to anything, affect the restraint but not the prohibition on misuse of confidential information.

Strong prima facie case?

[20] I accept that the plaintiff has established a strong prima facie case of an accrued cause of action being breach of the parties' employment agreement's prohibition on misuse of confidential information.

[21] Next, I accept that such a breach carries with it significant potential loss or damage to the plaintiff by misuse of confidential information by Mr Long in his new employment with one of the plaintiff's competitors. I accept also that there is a strong prima facie case that such loss or damage will not be adequately compensated for by an award of damages after trial.

[22] I accept also that there is sufficient evidence that Mr Long possesses relevant evidentiary material (being confidential information downloaded by him from the plaintiff's database to his own ESD). Next, I accept that there is a real possibility that if this application for an order searching for and copying that confidential information were to come to Mr Long's notice before execution of the order, he might destroy, conceal or otherwise cause that evidence to be unavailable for use at trial. I have so concluded for two particular reasons. First, the plaintiff has adduced evidence of dishonest dealings by Mr Long with confidential information during or immediately prior to his employment by Telecom. Second is the plaintiff's evidence, not only of copying confidential information from its database, but also of the deletion by Mr Long of this information from his Telecom laptop on the evening before his employment was to end at his instigation. Added to that is the evidence of downloading of strategic electronic whiteboard information on the following day.

[23] These are the circumstances in which I was satisfied that the plaintiff was entitled to a search order without notice on the conditions set out in the order that was sealed by the Court on 22 June 2011 and which is attached as an appendix to these reasons for judgment.

[24] Costs are reserved on this application.

[25] Leave is reserved to either party to apply on short notice for any further orders or directions but otherwise the matter will be back before the Court at 8.30 am on Tuesday 28 June 2011 for consideration of the first reports of the supervising lawyer and of the IT expert and for any applications to modify or set aside these orders that the defendant may wish to make.

[26] I confirm the condition of the order that the Court file is to be sealed and that no person other than counsel for the parties may search the file without an order of a Judge after hearing from the parties.

[27] I further direct that there be no publication of these reasons for judgment other than to the parties, their representatives, the supervising solicitor, and the IT expert, before at least 9.30 am on Tuesday 28 June 2011.

GL Colgan
Chief Judge

Reasons for Judgment signed at 12 noon on Thursday 23 June 2011