

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2012] NZEmpC 131  
ARC 48/12**

IN THE MATTER OF      an application for a search order sought  
                                 without notice

AND IN THE MATTER OF an application for interim injunction

BETWEEN                MATAMATA INDUSTRIAL  
                                 MACHINERY IMPORTS LIMITED  
                                 ("MIMICO")  
                                 Plaintiff

AND                        JOHN FITZGERALD KENNEDY  
                                 MCALLISTER  
                                 Defendant

Hearing:                2 August 2012  
                                 (Heard at Auckland)

Counsel:                Maria Dew and Peter Hardie, counsel for plaintiff

Judgment:              3 August 2012

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**REASONS FOR JUDGMENT OF JUDGE B S TRAVIS**

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[1]     On Thursday 2 August 2012, I issued a search order and an ex-parte injunction. These are my reasons for so doing.

[2]     The plaintiff, Matamata Industrial Machinery Imports Limited (MIMICO) had sought a search order pursuant to s 190(3) of the Employment Relations Act 2000 (the Act) and Part 33 of the High Court Rules and an interim injunction concerning the use of confidential material. The plaintiff sought the orders with urgency and without notice to the defendant as it considered there was a real possibility that:

- a)     documents held by the defendant included the plaintiff's confidential property which the defendant has to date failed to return to the plaintiff and which the plaintiff has reason to believe the defendant is using in his competing business; and

- b) the defendant may destroy or cause to be unavailable evidence for use in proposed proceedings before the Employment Relations Authority, as set out in a draft statement of problem which was filed with the application.
- c) the defendant may misuse the plaintiff's confidential information.

[3] It was clear from the affidavit evidence filed in support of the application and counsel's submissions that there was a very substantial and significant risk that any orders that might be made on notice could be nullified by the defendant deleting from his computer equipment, or concealing his possession of, the plaintiff's property. I was therefore satisfied that there was a risk of the destruction or concealment of relevant evidence and the misuse of confidential information which made it appropriate for this application to have proceeded without notice.

[4] The plaintiff has provided an undertaking as to damages and of its intention to commence proceedings in the Employment Relations Authority in terms of the draft statement of problem filed in the Court. I considered that there was sufficient urgency for the making of the orders sought, even though the proceedings have yet to be filed in the Authority, provided they were conditional upon the immediate filing of those substantive proceedings in the Authority once the search order has been executed. I was also satisfied by the affidavit evidence from the plaintiff's accountant that it has ample financial resources to meet an order for damages pursuant to the undertaking it has given.

[5] I made an interim suppression order relating to the affidavit evidence of the plaintiff's financial situation and directed that it not be served on the defendant although it could be provided to his solicitors in due course and with limitations on it being copied. I also made orders preventing the Court file being searched because the evidence before the Court contains commercially sensitive and confidential material.

### **Factual background**

[6] Substantial factual material has been placed before the Court. In view of the sensitivity of much of that material, the following is but a brief summary of the

factual background against which it was necessary to determine whether, in terms of r 33.3(a) of the High Court Rules, the plaintiff had shown a strong prima facie case on an accrued cause of action. Further, the defendant has not had the opportunity to respond to the pleadings, although, as will be seen, he has had the opportunity to respond to an extensive investigation into disciplinary matters forming the basis of this application.

[7] The plaintiff is a duly incorporated company having its registered office at Matamata. It carries on the business, throughout New Zealand and the Pacific Islands, of selling, hiring and servicing heavy machinery for the quarry, mining, construction, recycling and construction industries and importing and distributing heavy machinery, spare and wear parts for sale. Wear parts are those components in mining equipment which are intended to wear out whilst they perform their necessary function.

[8] The defendant, who also resides at Matamata, was employed by the plaintiff as a sales representative selling parts for heavy machinery in New Zealand and the Pacific Islands from about 2007 until his resignation, effective from 19 July 2012.

[9] During the course of the defendant's employment, his role included key part specialist sales roles, developing sales opportunities for spare and wear parts imported and distributed by the plaintiff, and, in particular, sales roles of a number of brands distributed by the plaintiff. He was paid by the plaintiff to maintain and to develop a close working relationship with its customers and suppliers and develop business opportunities for the plaintiff. He was responsible for substantial sales for the year ending 30 June 2012.

[10] The employment was governed by a written individual employment agreement dated 26 June 2009, which sets out the remuneration benefits for the defendant, his duties and expressly provides that the defendant cannot compete with the plaintiff in any activities which might adversely affect the plaintiff's business. This included a prohibition on carrying out work for MIMICO customers in his own time for his own gain. It also contains the following confidentiality clause.

e) **Confidentiality** – As part of normal duties, the employee may obtain, or have access to confidential information concerning MIMICO. Under no circumstances is any of this information except for purposes directly related to furthering the business objectives of MIMICO, as provided within the terms of the employers delegated authority.

[11] As will be seen there are words missing from this clause and there is no express statement in the agreement forbidding the misuse of that confidential information. However, there are clauses requiring all documentation, records, including electronic and handwritten, to be returned immediately if the defendant ceases employment and a provision which states:

Under no circumstances is information gained during their employment, to be used after their termination of employment.

[12] It is pleaded in the draft statement of problem that there are implied terms in the employment agreement that the defendant, during the course of his agreement, would act with loyalty and fidelity towards the plaintiff, including both inside and outside of work hours in the best interests of the plaintiff. Further, that he would act in good faith towards the plaintiff, including not doing anything to mislead or deceive or likely to mislead or deceive the plaintiff and to be active and constructive in the employment relationship. Section 4 of the Act provides the source for the duty of good faith.

[13] It is contended that during the course of his employment the defendant was provided with company information that was highly confidential and not otherwise publicly available. This included knowledge of the plaintiff's distribution information and rights within New Zealand and the Pacific Islands, which included obligations to observe strict confidentiality in relation to the following: pricing and design of products; knowledge of wholesale pricing margins; purchasing and credit facility arrangements with the suppliers of parts; knowledge of particular customer arrangements regarding pricing, leasing, servicing and service contracts which were commercially sensitive; knowledge of the development of and improvements in metallurgical recipes for parts and products produced by MIMICO's suppliers; knowledge of current business opportunities that the plaintiff was pursuing and knowledge of the plaintiff's sales performance and margins. This is all claimed to be

confidential information and, although there are denials that this is so in letters from the defendant's solicitors, I found that this is strongly arguable.

[14] It is alleged that from at least August 2011, while still employed by the plaintiff, the defendant established and operated a heavy machinery parts business for his own benefit without the plaintiff's knowledge or consent. The plaintiff provided evidence of the steps the defendant had taken to operate this business while employed by the plaintiff. For example, the plaintiff has provided evidence of the defendant engaging in attempts to sell second hand quarry equipment in conflict with MIMICO and evidence that he had travelled to the plaintiff's suppliers in China to divert sales to the defendant from MIMICO.

[15] On 23 December 2011, it is alleged that the defendant had a discussion with Rex Davies, the Managing Director of the plaintiff, who deposes in his affidavit that the defendant indicated that he wished to establish his own business in the sale of parts that was not in competition with that of the plaintiff. The correspondence from the defendant's solicitors confirms that discussion. Mr Davies deposes that the defendant said he wished to enter an independent contractor arrangement with the plaintiff for a period of 24 months. Mr Davies said that he expressed some doubt to the defendant as to whether this would be workable but invited the defendant to put his proposal in writing. This the defendant did on 5 January 2012 by an email and letter and on 6 January, the defendant and Mr Davies met to discuss the proposal. The letter did not detail the products and services the defendant wished to offer but stated that they were "outside of MIMICO's core business to the Quarry and Mining Industry" and that the products were ones he could work with "alongside MIMICO, and not against them".

[16] Mr Davies deposed that he told the defendant that he did not see how the defendant's proposal could work and asked for further information which was not provided.

[17] The plaintiff alleges that both prior to and after the discussion between Mr Davies and the defendant, the defendant had been operating and continued to operate, his own parts business without the plaintiff's consent.

[18] On 28 May, the plaintiff suspended the defendant on pay, pending the outcome of a disciplinary investigation into allegations of serious misconduct, including:

- a) The misuse of the plaintiff's confidential information;
- b) Operating his own business while employed by the plaintiff without the plaintiff's consent;
- c) Diverting business opportunities for his own use in breach of his employment obligations to the plaintiff.

[19] On 17 July, the plaintiff issued its preliminary decision that the defendant had been involved in serious misconduct as alleged. The defendant resigned from his employment as from the end of business on 19 July.

[20] It is alleged that the defendant has failed to return the plaintiff's property, including copies of documents, emails and photographs, which he gained during his employment with the plaintiff.

[21] The plaintiff also alleges that since the defendant's resignation, it has discovered that the defendant had diverted a significant business opportunity belonging to the plaintiff for his own benefit and that the plaintiff has not received any further orders from that particular customer.

[22] On 8 May, some two days before the defendant was due to take leave and travel to China, Mr Davies became aware that the defendant had printed a large amount of information from the plaintiff's database which listed customers of a particular supplier who had purchased parts from that company up to August 2007. The printed information ran to 106 pages and was found in a drawer in the defendant's desk. Mr Davies deposed that he could think of no legitimate reason why the defendant would need to have printed this material as it was available at all times on the plaintiff's computer server.

[23] Before the defendant left on leave, Mr Davies expressed the plaintiff's concerns and asked the defendant to leave his laptop computer (the laptop) and his

mobile phone, both provided by the plaintiff, so that they could be inspected. The defendant confirmed he was travelling to China for a holiday

[24] On 15 May, the laptop and mobile phone were sent to a company in Auckland, Computer Forensic Solutions Ltd (CFS) for inspection purposes and Brent Peter Whale of that company provided an affidavit in support to which I will refer later.

[25] As a result of the inspection of the laptop, a decision was made to suspend the defendant once he returned from his holiday. This took place on 28 May. He was provided with a letter setting out in detail the material which was of concern to the plaintiff and which also asked him whether he had at his home or elsewhere in his control or possession, any other information he had obtained from the plaintiff.

[26] On 5 June the plaintiff's solicitors, Jones Howden, received a letter from the defendant's solicitors, Norris Ward McKinnon, denying the following: that the defendant had any intention of competing with the plaintiff; that he had ever transferred information belonging to the plaintiff to any person or computer or storage device; that he had ever disclosed any confidential information, and asserting that he had delivered any property that belonged to the plaintiff to the plaintiff's solicitors. It referred to the defendant's disclosure to the plaintiff of his intentions to start his own business and claimed that he had simply started to put those intentions into action. It complained that the plaintiff had seized his computer under false pretences, which had caused him stress and distress.

[27] The plaintiff's solicitors wrote to the defendant's solicitors on 13 June setting out further allegations and referring to documents which appeared to demonstrate that the defendant had had access to personal email accounts and had sent emails from his laptop via a personal email account. The plaintiff requested access to copies of the emails and the documents concerned. The defendant's solicitors responded on 22 June denying that any information the defendant had passed on to another company belonged to the plaintiff or that the defendant had acted unlawfully.

[28] On 29 June, a disciplinary meeting was held with the defendant and his solicitor. After the meeting further discussions took place. On 5 July, through his solicitors, the defendant tendered his resignation. In that letter it was contended that the allegations against him made it impossible for him to continue in the plaintiff's employment.

[29] The plaintiff continued with the disciplinary process and provided the defendant a preliminary decision on 17 July. These preliminary findings included a finding that during the course of his employment the defendant, without the permission of the plaintiff, had used the plaintiff's property for the purpose of preparing and establishing his own business and that he had engaged in other work which either had, or could have, adversely affected the plaintiff.

[30] The plaintiff continued to endeavour to obtain access to copies of the email correspondence found on the laptop. By a letter from his solicitors dated 22 June, the defendant advised that he was unable to provide copies of the emails requested "as they are no longer available as they were all on web-based internet log-in and are no longer available".

[31] The expert advice from Mr Whale in his affidavit was that the content of the emails may be able to be determined by a search of the defendant's home computer and of the particular email account. This would require access to the user name and password. Mr Whale has also deposed that his search was not able to determine what types of documents had been copied to removal media from the laptop but that his search did confirm that a number of removal media devices were attached to that laptop in the period between 1 January and 25 May 2012.

[32] Some of the email material recovered from the laptop indicated payments received, prices for parts and equipment, communications with potential customers and business cards for a company with the initials CMS.

[33] The plaintiff also relies on a letter from the defendant's solicitors, dated 5 July, in which it is stated that the defendant:



is open to Mimico providing a list of the emails it is concerned about him sending and Jon will ensure that this information has been deleted.

[34] The plaintiff's solicitors responded on 10 July and queried this response stating:

Mimico is confused by paragraph 22 of your letter. In that paragraph Mr McAllister refers to e-mails contained on his personal computer. Mimico has already provided Mr McAllister with a list of e-mail correspondence that was accessed by him using its internet account and using the laptop computer supplied to him by Mimico. Mimico previously asked for copies of those e-mails to be supplied to it, but was advised that those e-mails could not be retrieved by Mr McAllister. Please advise what is the position?

[35] The defendant's solicitors replied on 11 July:

To clarify paragraph 22 of my letter. If Mimico has particular concerns about emails Jon has sent, the contents of which they are aware, please let us know and Jon will ensure they are deleted. This offer is made without prejudice to our assertion that Jon is not in possession of any Mimico or Metso confidential information. Jon has already advised that he is unable to provide copies of the emails previously requested by Mimico as they are unable to be retrieved.

[36] On 20 July, the plaintiff's solicitors wrote to the defendant's solicitors and attached a form it required the defendant to sign. On 30 July, the defendant's solicitors responded listing what were said to be the defendant's personal items still with MIMICO and stating that, once they had been returned, the defendant would return some items of MIMICO that he had. It concluded:

Once Mimico have returned Jon's belongings and Jon has returned Mimico's belongings, Jon will sign the document stating that he has no Mimico property in his possession.

[37] Mr Davies expresses concern that although there is evidence of removal storage devices being connected to the laptop, no such devices have been returned to the plaintiff. There are also concerns that the defendant may not be being truthful about what confidential property belonging to the plaintiff he has taken and there is a real risk that he would be willing to delete or destroy that information once he learns of the proceedings that the plaintiff intends to take against him. There is a risk that the defendant could hide or remove any computers or documents which might contain relevant information about the allegations the plaintiff has made against him

in the draft proceedings. If the proceedings to be shortly filed in the Authority were to have been served upon the defendant before the execution of the search order, this could lead to the possibility of the defendant deleting or hiding any relevant information that he might have on his private computers at his home. These concerns were supported by the evidence presently before the Court.

[38] Mr Davies deposed that he has been overseas in the United States on business since the defendant's resignation, returning late on Sunday 29 July and that this application was filed at the first reasonable opportunity following his return to New Zealand. This satisfactorily explains the delay.

[39] I found from the affidavit evidence and the submissions that the plaintiff has established a strong prima facie case of accrued causes of action and that there is a significant potential for loss or damage to the plaintiff by the misuse of the confidential information by the defendant. I find there is sufficient evidence that the defendant possesses relevant evidentiary material downloaded onto portable devices from the laptop he used whilst in the plaintiff's employment during the period from 1 July until 25 May 2012.

[40] As to the ex-parte application for an injunction preventing the use of any confidential information belonging to the plaintiff in the defendant's possession, I considered that all of the factors the Court takes into account in determining whether such an interim injunction should be issued, were satisfied. There was a strong prima facie case. The balance of convenience until the matter could be fully heard favoured the plaintiff. The overall justice of the case, based on the evidence in support of the allegations of breach of contract on the part of the defendant, also favoured the grant of the injunction sought.

[41] I therefore found that the plaintiff was entitled to both the search order and the interim injunction without notice to the defendant on the conditions set out in the search and interim injunction order that was sealed by the Court on 2 August and which is attached as an appendix to these reasons for judgment.

[42] I reserve leave to either party to apply on short notice for any further order or directions. Otherwise the matter will be back before the Court at 11am on Monday 13 August 2012 for consideration of the first reports of the supervising lawyer and of the IT expert and to deal with any applications to modify or set aside the orders that I have made.

[43] I confirm the condition of the orders that once the search order has been executed, the plaintiff should proceed to file its application in the Employment Relations Authority in the form of the draft statement of problem with any necessary modifications.

[44] These reasons for judgment are not to be published other than to the parties, their representatives, the supervising solicitor, and the IT expert, before at least 4pm on Monday 13 August 2012.

[45] Costs were reserved on the application.

B S Travis  
Judge

Judgment signed at 2.45pm on 3 August 2012