IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 19
ARC 4/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LANCE WARMINGTON First Plaintiff
AND	SHAUN O'NEILL Second Plaintiff
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing: 2, 3 and 10 February 2012
(Heard at Auckland)

Counsel: Stephanie Dyhrberg, counsel for first and second plaintiff
Mary Wilson and Rachel Webster, counsel for defendant

Judgment: 14 February 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] This is a challenge brought on a de novo basis against a determination of the Employment Relations Authority upholding the enforceability of restraint of trade provisions in the plaintiffs' individual employment agreements. The Authority determined[1] that the plaintiffs were subject to a three month restraint of trade. That period expires in mid-March. This challenge was heard on an urgent basis.

[1] [2011] NZERA Auckland 536.

Background

[2] Both plaintiffs were employed as plant managers by the defendant company (AFFCO New Zealand Ltd) until mid December 2011. Mr Warmington was employed from March 2008 to manage AFFCO's Rangiuru plant at Te Puke. Mr O'Neill was employed from October 2007 to manage the Imlay plant at Wanganui. Both tendered their resignations in mid-September 2011, advising that they had been offered positions with Silver Fern Farms Ltd.

[3] There was no dispute that Silver Fern Farms is a competitor of AFFCO's.

[4] The plaintiffs entered into individual employment agreements with AFFCO at the time of their appointment. Each agreement contained a restraint of trade clause, in the following identical terms:

> 9.1 In order to protect the Employer's proprietary interests, for three months after the termination of this agreement the Employee agrees not to engage to work for or on behalf of an organisation in direct competition with the Employer, nor establish their own business in competition with the Employer.
>
> 9.2 For three months after the termination of this agreement the Employee agree[s] not to solicit in competition with the Employer the custom of any person who has at any time during the period of the Employees employment by the Employer been a customer of the Employer or who shall become a customer of the Employer as a result of any tender, negotiations, arrangements or proceedings made or taking place at the date of such termination.
>
> 9.3 Consideration for this restraint is included in the remuneration package provided in clause 5.1 of this agreement.
>
> 9.4 It is acknowledged that in view of the Employees position with the Employer and the Employees direct association with the customers of the Employer during your employment, the restraint provided in sub clause 9.1 is fair and reasonable and does not inhibit the Employees ability to earn a reasonable living.

[5] Mr Warmington and Mr O'Neill both say that they raised concerns about the restraint of trade provision with Mr Ogg (Director of Operations) prior to entering into their respective employment agreements.

[6] Sometime in 2007, Mr O'Neill was approached by Mr Ogg inquiring whether he was interested in the plant manager role at Imlay. Mr Ogg subsequently visited

Mr O'Neill at his home and left him with a copy of a proposed agreement. Mr O'Neill had two issues with the proposals. He took issue with the amount of money on offer ($120,000). He also queried the restraint of trade provision, which was in the terms set out above. Mr O'Neill's evidence was that he told Mr Ogg that he did not like the restraint of trade provision and that he had "major issues" with it. He says that he remembers "word for word" the conversation that took place, and that Mr Ogg responded to the concerns he had raised by saying "don't worry about it, it's in all the contracts, but it's not worth the paper it's written on."

[7] Mr O'Neill negotiated an agreement to review his starting salary after three months. He also negotiated to have relocation costs and accommodation paid for by AFFCO. Mr O'Neill says that, based on the assurances he had received from Mr Ogg, he decided to enter into the agreement despite the restraint of trade provision remaining unchanged and despite the concerns he had identified in relation to it.

[8] Mr Warmington applied for his role of plant manager in 2008 and was offered the position. He says that he was happy with the draft agreement, subject to two concerns. The first was in relation to the salary that had been offered and the second was in relation to the restraint of trade provision. He raised these concerns with the then operations manager, Mr Graham. Mr Ogg contacted Mr Warmington the following day and raised the restraint of trade issue. Mr Warmington says that he remembers the conversation "extremely clearly", "virtually on a word for word basis." He says that the conversation went as follows:

> Mr Ogg: "I believe you have concerns with the restraint of trade clause of the contract".
>
> Mr Warmington: "yes".
>
> Mr Ogg: "There is really nothing to worry about on this as I have it in mine also. I've had my lawyer review this and they have indicated it's not worth the paper it's written on. Just sign and let's get on with it."

[9] Mr Warmington said that it had been his intention to have his lawyer review the draft agreement and advise on the restraint of trade clause. However, when he contacted his lawyer's office, he was told that his lawyer had died. Having negotiated a $10,000 increase in the salary on offer and having regard (Mr Warmington says) to Mr Ogg's assurances, he proceeded to sign the agreement.

[10] There is no dispute that Mr Ogg had pre-contractual discussions with each of the plaintiffs. What is in dispute is what was said. I return to this later.

[11] In early 2011, Mr O'Neill was approached by Silver Fern Farms and offered a job. He advised his manager of this and was offered a substantial increase in his salary as an incentive to stay with AFFCO. AFFCO invited him to sign a new agreement which included two changes, first to reflect the rise in salary and second to insert reference to a payment of $15,000 as being consideration for the restraint of trade provision in clause 9. Mr O'Neill took issue with the latter proposed change and was advised that it simply reflected the formulation that was being incorporated into all of the company's new contracts. He declined to accept a revised agreement with that clause in it. Mr Ogg then became involved and spoke to Mr O'Neill. On 15 April 2011, a revised cl 9.3 was put to Mr O'Neill for consideration, which provided that:

> The parties acknowledge that this agreement updates and replaces the previous employment agreement between the parties dated 29th October 2007 and that, as with the earlier agreement it is accepted that the salary includes consideration for the Restraint of Trade.

[12] An email exchange then ensued. Mr O'Neill wrote to Mr Ogg the same day:

> Rowan
>
> Just to clarify as the wording in the ... new contract around the restraint of trade is very similar to the old contract apart from an extra paragraph.
>
> As you previously indicated to me when I signed the first contract is the restraint of trade still not enforceable??"

[13] Mr Ogg replied promptly, advising that:

> Hi Shaun, clearly such a decision will be down to the Authority/Court if this is going to be tested, however that sentence simply links the previous and current contracts. I shall call when on the road.

[14] As promised, a telephone call was made while Mr Ogg was driving home. Mr Ogg said the conversation lasted some 30 minutes and included a heated exchange about Mr O'Neill's assertion that Mr Ogg had previously told him that the restraint of trade was not enforceable. Mr O'Neill's recollection of the conversation differs. His evidence was that while they had a lengthy call, the conversation only turned briefly to the restraint of trade issue. He said that he reminded Mr Ogg that

he had told him in 2007 that the restraint of trade clause was not worth the paper it was written on, and that Mr Ogg said something like "that would be up to the courts if it was challenged." Mr O'Neill says that he replied by saying "remember what you told me when I first signed up" and that Mr Ogg failed to respond.

[15] There is no dispute that Mr Ogg and Mr O'Neill had a lengthy conversation on this date. The details of what was discussed are in dispute.

Main contentions of parties

[16] The plaintiffs' first contention is that the restraint of trade provision was entered into as a result of unfair bargaining and ought not to be enforced on this basis. They contend that they entered into their respective employment agreements and terminated their employment in the genuine belief that the restraint of trade provisions contained within them were not binding, enforceable or justifiable. They say that they relied on what Mr Ogg had told them and entered into the agreements on this basis. Secondly, the plaintiffs claim that even if there was no unfair bargaining, the evidence falls short of establishing that the provision is reasonable and necessary to protect any genuine proprietary interest of AFFCO. It is further submitted that any information belonging to the defendant to which the plaintiffs had access during the course of their employment was not capable of being used in any way to harm any proprietary interest of the defendant, that there is no credible risk of harm to the defendant, and that the sole purpose of enforcement by the defendant is to inconvenience a competitor.

[17] The plaintiffs seek a declaration that the restraint of trade provisions are unenforceable on the basis that they are not reasonably necessary to protect a genuine proprietary interest of the defendant; a declaration that the provisions were the result of unfair bargaining and should be of no effect; reimbursement of lost income; interest and costs.

[18] The defendant rejects any suggestion of unfair bargaining and disputes what Mr Ogg is said to have told the plaintiffs. It is submitted that even if the plaintiffs did rely on anything Mr Ogg had to say (which is denied), any such reliance was unreasonable. In addition, it is said that Mr Ogg did not know that they were relying

on him, and nor should he have reasonably known they were doing so having regard to the circumstances, including his previous (fleeting) dealings with them.

[19] The defendant argues that the plaintiffs held senior operational roles within the company and were ultimately responsible for the efficient and profitable operation of the plants they managed. It is said that they could not discharge those responsibilities without involvement, knowledge and understanding of procurement, supplier and customer relationship management and that the plaintiffs' "total picture" and detailed knowledge of the defendant's business was such that it could easily be used to benefit the plaintiffs' new employer. The defendant contends that the restraint of trade clauses are reasonable and not contrary to public policy, and are accordingly enforceable.

The Grounds for Challenge

[20] The plaintiffs' challenge was advanced on two grounds – that the agreements entered into by each of the plaintiffs in respect of the restraint of trade provisions were the result of unfair bargaining (under s 68 of the Employment Relations Act 2000) and that the restraint of trade provisions are unreasonable and ought not to be enforced. As counsel agreed, the facts are pivotal and relevant (in terms of what occurred during the pre-contractual discussions) to a determination of both grounds of challenge.

Section 68: Unfair bargaining

[21] Section 68 provides that:

> **68 Unfair bargaining for individual employment agreements**
>
> (1) Bargaining for an individual employment agreement is unfair if—
>
> (a) 1 or more of paragraphs (a) to (d) of subsection (2) apply to a party to the agreement (**person A**); and
>
> (b) the other party to the agreement (**person B**) or another person who is acting on person B's behalf—
>
> (i) knows of the circumstances described in the paragraph or paragraphs that apply to person A; or

(ii) ought to know of the circumstances in the paragraph or paragraphs that apply to person A because person B or the other person is aware of facts or other circumstances from which it can be reasonably inferred that the paragraph or paragraphs apply to person A.

(2) The circumstances are that person A, at the time of bargaining for or entering into the agreement,—

(a) is unable to understand adequately the provisions or implications of the agreement by reason of diminished capacity due (for example) to—

(i) age; or

(ii) sickness; or

(iii) mental or educational disability; or

(iv) a disability relating to communication; or

(v) emotional distress; or

(b) reasonably relies on the skill, care, or advice of person B or a person acting on person B's behalf; or

(c) is induced to enter into the agreement by oppressive means, undue influence, or duress; or

(d) where section 63A applied, did not have the information or the opportunity to seek advice as required by that section.

(3) In this section, **individual employment agreement** includes a term or condition of an individual employment agreement.

(4) Except as provided in this section, a party to an individual employment agreement must not challenge or question the agreement on the ground that it is unfair or unconscionable.

[22] Relevantly for present purposes, s 68 provides that bargaining for an agreement is unfair if at the time of bargaining the employer knew, or ought to have known, that the employee reasonably relied on the skill, care and advice of the employer.

[23] It is for the plaintiffs to establish on the balance of probabilities that there has been unfair bargaining under s 68.

[24] There was no suggestion that Mr Ogg was acting in anything other than on behalf of the company at the time he had the discussions complained about with the

plaintiffs. In issue is what was said during these discussions; what, if anything, could reasonably be taken from the comments that Mr Ogg is found to have made; whether either of the plaintiffs reasonably relied on what Mr Ogg said; and, if so, whether Mr Ogg knew, or ought reasonably to have known, that that was so. I deal with each issue in turn.

What was said?

[25] It is common ground that the parties discussed the restraint of trade provision before the plaintiffs entered into their respective agreements. I have summarised the plaintiffs' evidence in relation to these discussions above. That evidence contrasts starkly with Mr Ogg's version of events.

[26] Mr Ogg accepted that Mr O'Neill told him that he did not like the restraint of trade provision during the course of discussions at Mr O'Neill's home in 2007, but strongly disagreed with Mr O'Neill's evidence as to what he had said to him. He said that he commented to Mr O'Neill that while such provisions are sometimes held to be unenforceable, if Mr O'Neill intended to breach the clause he should assume that AFFCO would seek to enforce it. Mr Ogg said that his emailed response to Mr O'Neill on 15 April 2011 reiterated what he had made clear during their 2007 discussion, and that this was repeated again during their subsequent telephone discussion. Mr Ogg's evidence in relation to the telephone conversation that took place while he was driving was that Mr O'Neill advised him that in 2007 he thought that he (Mr Ogg) had told him that the restraint of trade may not be worth the paper it was written on. Mr Ogg stated that he had strongly disagreed with this and advised Mr O'Neill that his advice in 2007 was that results from cases concerning such provisions were mixed but that AFFCO was serious about the issue and Mr O'Neill could be sure that if he chose to test the clause the company would seek to enforce it. He says that at that point Mr O'Neill agreed with his recollection of the earlier conversation.

[27] Mr Ogg did not recall exactly what was said during the course of his discussions with either plaintiff. However, his clear recollection was that he gave Mr Warmington a similar response, telling him that while restraint of trade provisions

are sometimes held to be unenforceable, if he intended to breach it he could be certain that AFFCO would seek to enforce it.

[28] Counsel's characterisation of the plaintiffs' evidence as straightforward and compelling is not one I adopt. Mr O'Neill prevaricated when various questions were put to him in cross examination and became evasive at times, including in response to questions relating to the use a competitor might put to various AFFCO reports and the enforceability or otherwise of restraint of trade provisions. Mr Warmington gave evidence that Mr Ogg had told him that he had a restraint of trade clause in his own agreement and that he had obtained legal advice on it. It was established in evidence, however, that Mr Ogg did not have such a provision in his agreement and had received no such advice. This makes it improbable that Mr Warmington's virtually "word for word" recall of the conversation he had with Mr Ogg is correct, unless Mr Ogg was lying. The only real basis for any such suggestion was that Mr Ogg was so keen to secure Mr Warmington's services on behalf of AFFCO that he was prepared to lie to him in order to lull him into a false sense of security, while knowing that if the restraint of trade provision was ever breached, Mr Warmington would be actively pursued by AFFCO in legal proceedings. There was no evidence to support any such inference being drawn. Mr Ogg's evidence, which I accept, was that while he wanted Mr Warmington to take on the plant manager role that was not at any cost.

[29] Nor do I find Mr Ogg's evidence that he did not have a precise recall of the conversations surprising, given the timeframes involved. That contrasts with each of the plaintiffs who respectively asserted a "word for word" recall and a "virtually word for word" accurate recall of conversations that had taken place some four and five years previously.

[30] Further, there were inconsistencies in both plaintiffs' evidence in relation to the nature of their relationship with Mr Ogg, which are detailed later.

[31] It was put to Mr Ogg in cross examination that he could not be sure that he had told each of the plaintiffs that the restraint of trade provision "was not worth the paper it was written on." His response was unequivocal. He said that he had "never ever said that they are not worth the paper they are written on and I don't know how

they [the plaintiffs] could take that from anything I did say." Mr Ogg accepted that he may, in talking to people about restraint of trade provisions, say that they "may not be worth the paper they are written on." It was put to him in cross-examination that it was possible that he may have used these words when talking to the plaintiffs. He accepted that he could not say with absolute certainty that he had not done so, but made the point (which I accept) that even if he had, this fell well short of a definite statement. And his evidence was that the statement about enforceability was coupled with the clear message that the plaintiffs could be sure that AFFCO would seek to enforce the restraint of trade provision if it was challenged.

[32] I accept Mr Ogg's evidence that while he does not have a standard line on restraint of trade provisions he does seek, when the issue arises, to convey the general view that they are sometimes not held to be enforceable but that AFFCO would seek to enforce such provisions. I find it more probable than not that this was precisely the message that Mr Ogg conveyed to both plaintiffs during his discussions with them. I do not accept Mr O'Neill's evidence that, in the lead up to the 2011 agreement, Mr Ogg agreed that he had told Mr O'Neill something different in 2007. While Mr Ogg could have expressly rejected the suggestion that this was so in Mr O'Neill's email of 15 April 2011, it is clearly implied in his reply to Mr O'Neill. And Mr Ogg's reply is consistent with his evidence about what he generally says about restraint of trade provisions.

[33] Having had the advantage of seeing each of the witnesses give evidence, and having regard to the evidence that was presented in Court, I prefer Mr Ogg's evidence as to what occurred during the conversations with the two plaintiffs. I do not accept that Mr Ogg told either plaintiff that the restraint of trade provision was not worth the paper it was written on. I find that Mr Ogg used words to the effect that sometimes restraint of trade provisions are held to be unenforceable but that both plaintiffs could be certain that if they sought to breach the provision AFFCO would seek to enforce it.

What could reasonably be taken from the discussions?

[34] Two points could reasonably be taken from the discussions that occurred between Mr Ogg and each of the plaintiffs. First, that Mr Ogg was of the view that

restraint of trade provisions are sometimes held to be unenforceable. Second, that they could be confident that if they sought to breach their restraint of trade, AFFCO would seek to enforce it.

Reasonable reliance?

[35] The first point is simply a statement of the obvious. Taken in combination, what was said could not reasonably have reassured the plaintiffs that the provision was either unenforceable or that AFFCO would not seek to enforce it. That effectively disposes of the claim of unfair bargaining. There was none. However, I pause to make the following points.

[36] Both plaintiffs were experienced men operating at a senior level. Both had commercial nous, reflected in their ability to negotiate enhanced provisions in their employment agreements.

[37] Both accepted that they had the opportunity to access legal advice. The fact that Mr Warmington, following his conversation with Mr Ogg, actively took steps to obtain such advice reinforces Mr Ogg's recollection of what occurred and undermines Mr Warmington's evidence that he was reassured by what Mr Ogg had had to say. Despite the plaintiffs' experience, and their apparent reservations about the restraint of trade provision, neither took the step of recording their initial conversations with Mr Ogg in writing. Both gave the strong impression of being ambitious, intelligent and commercially astute. I find it inherently unlikely that had the conversations taken place as they say, they would not have committed something to writing. Mr O'Neill accepted in cross examination that he had no knowledge of what, if anything, Mr Ogg knew of restraint of trade provisions, did not ask Mr Ogg if he had experience of them, or if he had one in his employment agreement, but did know of one case in which a restraint of trade provision had been enforced.

[38] While both plaintiffs detailed the respect they had for Mr Ogg and gave the impression, during evidence in chief, that they knew him relatively well, any such impression was effectively dispelled during the course of cross examination and Mr Ogg's evidence. It soon became apparent that the plaintiffs could not claim a close relationship with him. Mr Ogg worked in a different plant and at a different level.

[39] Mr Warmington went so far as to describe Mr Ogg as something of a "mentor" to him through his career within the meat industry. He said, by way of example, that he had been offered an opportunity to take up a position in Canada in 2006 and – prior to committing – had telephoned Mr Ogg. He said that this demonstrated the amount of regard he had for Mr Ogg. However, it was Mr Ogg himself who had been contacted in respect of the Canadian position. He was not interested in it but was asked if he knew of anyone who might be. He had heard that Mr Warmington might be considering a move and contacted him to suggest that, if that was so, he might like to pursue matters. Mr Ogg refuted Mr Warmington's suggestion that he had been a mentor to him, and such a suggestion is implausible given the fact that the two had only met occasionally prior to Mr Warmington's appointment to AFFCO in 2007. Mr Warmington accepted in cross examination that he had had few direct dealings with Mr Ogg and had in fact only attended a couple of meetings with him.

[40] I find that neither Mr Warmington nor Mr O'Neill had a close relationship with Mr Ogg, as they initially claimed.

Did Mr Ogg know or ought he to have known the plaintiffs had reasonably relied?

[41] While Mr Ogg did not have a close relationship with either plaintiff, Mr Ogg was the person who acted on AFFCO's behalf during key parts of the pre-contractual negotiations. He was a senior person within the organisational structure, and I accept that he was well regarded generally within the industry and that the plaintiffs were aware of this. Mr Ogg is not a lawyer and did not purport to be a lawyer. Nor did he purport to give either of the plaintiffs specific advice on the enforceability of the restraint of trade clause. What he did make clear was that the company would seek to enforce the clause if either plaintiff moved to breach it. The plaintiffs had time to reflect on the draft agreements that had been presented to them and to take appropriate advice, if that is what they wanted. Mr Ogg could not reasonably have known that either plaintiff was relying on anything he had to say about enforceability, given that this is plainly a legal issue. And, in any event, as I have found, Mr Ogg's comment about enforceability was correct, was not misleading, and was followed up with a comment that AFFCO would likely take action to enforce the provision.

Restraint of Trade

[42] Contractual provisions restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the employer in the public interest: see *Gallagher Group Ltd v Walley*[2] citing *Mason v Provident Clothing and Supply Company Ltd.*[3]

[43] The onus of establishing that a restrictive provision is reasonable is on the employer.[4] A restraint of trade provision should be no wider than is required to protect the party in whose favour it is given.[5]

[44] A number of factors are to be considered in determining the reasonableness or otherwise of a restraint of trade provision. Restraints by employers are enforced only to the extent required to protect a proprietary interest of the employer. The nature of the employee's role and the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.

[45] The reasonableness of a restraint of trade provision is to be determined at the time the agreement was entered into, *not* the time it is sought to be enforced: *Walley* at [23].

Proprietary interest?

[46] An employer is entitled to impose a restraint of trade to protect proprietary interests which require protection: *H & R Block Ltd v Sanott.*[6]

[47] AFFCO seeks to restrain the plaintiffs on the basis of concerns relating to confidential and commercially sensitive information which AFFCO says the plaintiffs had access to during the course of their employment as plant managers and which would prejudice it if disclosed to a competitor (Silver Fern Farms).

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[2] [1999] 1 ERNZ 490 (CA) at [20].
[3] [1913] AC 724 (HL) at 733.
[4] *Gallagher* at [28].
[5] *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731, [2001] ERNZ 46 (CA) at [28].
[6] [1976] 1 NZLR 213 at 218.

[48] A quantity of information is referred to, including information contained within a weekly report, sent out to all plant managers, production managers, divisional managers and plant accountants, providing a margin analysis by species of stock class and plant (the Boning Spec Summary by Plant). This report includes information relating to the average carcass weights, average livestock cost prices, overall yield data, revenue streams for meat, offal, hides/skins, rendering, blood production, Allied division contributions, operating margins per head, processing costs (including staff related costs), and other operating costs (such as packaging, fuel, power, supplies, compliance costs, cold storage and freight, and water). The report provides a weekly gross margin per head by species and class of stock by plant.

[49] The report provides data to plant managers about their own plant's performance across categories to enable them to benchmark their plant against the performance of other plants. It also provides data about where cost improvements might be made. Mr Ogg's evidence, which I accept, was that the information contained within this report, and information that can be gleaned from the report about trends within AFFCO's plants over time, would be useful to a competitor. In particular, such information could be used by a competitor to determine competitive financial performance, and relative procurement market shares for livestock and livestock costs. In this latter regard, Mr Ogg noted that procurement shares are important as they determine company growth and are the determinant for quota allocation for the US and EU markets.

[50] Similar concerns arise in relation to a daily costing report that is distributed within AFFCO to all plant managers. It provides an analysis of volumes by stock class and species, yields, weights, livestock costs, variable processing costs, and revenues to give an estimated contribution margin for each plant by stock class. Detailed offal yield analysis is embedded in the report. AFFCO contend that a competitor could use this information to compare their own performance within their organisation, and in particular compare their own livestock costs and contribution margins.

[51] A daily offal recovery report by plant is also circulated internally within AFFCO, detailing the amount as a percentage of carcass weight of offal recovered daily at each plant.

[52] A Plant Closure Programme is also available to plant managers, which contains livestock kill projections weekly by plant as forecasts and is regularly updated. AFFCO's concerns relating to the information contained within this report is that it could be used by competitors to determine AFFCO's forecast level of activity and to assess its business model as forecast for the year.

[53] A daily EU product percentage by plant report is sent to plant managers and others and contains information by plant and product type produced for the European Union (EU). It is contended that this information would be valuable to a competitor to benchmark proportion of production versus their own performance.

[54] In addition, plant managers receive a daily chilled lamb by plant report. It was explained that chilled lamb typically provides the best net revenue cut for cut per kilogram, and the proportion of a plant's production falling into this category noticeably affects the final weekly margin. The report is said to be useful, including for competitors, for comparative purposes.

[55] Plant managers also have access to the company's projected annual livestock procurement plan, by stock type, by plant by week (updated weekly on a twelve week rolling cycle); product specifications of all species (detailing the product, cutting lines, packaging options, standard yields and descriptions of how they are produced); and production records (which contain detail on EU production and chilled production, and information on volumes and product types which are exported to the highest priced lamb market).

[56] Other information which the defendant is concerned about, and which plant managers have access to, included order summaries (containing information by order number, customer names, shipping details, specific products sold on the order, actual pricing, and currency and exchange rates); volumes shipped against each order; specification details covering product forms (detailing cutting and trim requirements and packaging details); stock reports (including aged stocks and stock on hand); kill records and other summaries. The other summaries would provide a competitor with

exact details of each order provided to every customer of AFFCO, together with their terms of trade.

[57] Overall, this material provides detailed product specifications and pricing; detailed customer information; and information about the geographical spread of livestock suppliers and volumes and types of stock supplied for the plant.

[58] Mr Winders, the Chief Operating Officer at Silver Fern Farms, expressed the view in evidence in chief that none of the information known to the plaintiffs, or to which they had access, in relation to AFFCO's stock procurement, plant operations, or sales activity would be of interest to Silver Fern Farms, and nor could it be used to its advantage if it was disclosed to them. He emphasised the dated nature of much of the information (given that it is updated on a regular basis), the volatility of the sales market, and asserted that information on products is widely available throughout the industry. Mr Winders was referred to a number of AFFCO reports and said that he found them difficult to decipher, and of limited use to someone in his position. However, Messrs O'Neill and Warmington would have no such difficulty, given that this was precisely why the information had been made available to them in their roles at AFFCO. It follows that they could be in a position to act as 'interpreters'.

[59] Silver Fern Farm's lack of competitive interest in the information referred to by Mr Ogg was reinforced by Mr Winders' evidence that the company has no interest in expanding its customer base; rather its focus is on meeting its own existing client needs and maximising profitability. However, even if Silver Fern Farms is uninterested in expanding its market share into AFFCO's current customer base, I accept Mr Ogg's evidence that the information would be more broadly useful. It would be highly relevant in assessing where cost-cuts might usefully be made and in identifying flagging areas which Silver Fern Farms might want to drill down on, despite any difficulties Mr Winders said might be associated with doing this.

[60] And while Silver Fern Farms has its own benchmarking systems, Mr Winders agreed that there were similarities in terms of their component parts. He also accepted in cross examination that pricing information relating to AFFCO's operations would be of interest to Silver Fern Farms, but emphasised that he did not have that information. I accept Mr Ogg's evidence in relation to the potential utility

of the information contained in the various reports to a competitor, such as Silver Fern Farms. He went into the issue in considerable detail in his evidence. While he accepted that not all of the information was precise, it did provide a total picture and very useful information in terms of benchmarking. He made the point that seemingly minor differentials in cost (such as 10c a kilogram) could have significant repercussions taken across a large number of animals each day. If a plant was obtaining a slightly different value per kilogram for its meat, compared to another plant, then the plant getting the lower value would be extremely interested in that. The plaintiffs accepted that they used some of the material referred to by Mr Ogg, including the Boning Spec summary and daily production and weekly kill plan, and accepted that such reports assisted in monitoring their plant's performance, to indicate areas where the plant could improve, and to compare their performance with the performance of other plants.

[61] Mr Ogg strongly refuted Mr Winders's suggestion that even if he was given the information he would find it of little utility. His response, when asked, was that he would "dearly love" to view competitor material of this sort, and did not accept that differences in the companies' approach to measuring performance would present any real barrier to understanding, and gaining something from, the information. That is because the base data remained the same. Mr Ogg said that if he had access to competitor information of this sort he would be "immediately benchmarking that against our own performance." He described this sort of information as "huge, it's vitally important information...it's critical, confidential information to us."

[62] The plaintiffs down-played the value of the information, and said that they only accessed a limited amount of it. However, the value of the reports and information contained within them to the plant manager role was clearly articulated by Ms Ogg in her evidence. Ms Ogg is plant manager at AFFCO's Horotiu plant in Hamilton. She detailed why the material was important and useful to her, and the way in which she used it, as plant manager, to increase efficiencies and improve profitability in her plant. She also gave evidence that the information would be useful to a competitor for some time. Ms Ogg was not challenged on this evidence.

[63] An important characteristic of this information, provided as much of it is for benchmarking purposes, is to provide detail of all of AFFCO's plants throughout

New Zealand. The plaintiffs had access to information not only about the detailed operational aspects of their own plant, but also about every other AFFCO plant in the country processing all the various kinds of carcasses. Clearly such detailed information is commercially sensitive and confidential, and that the proprietor of the information – AFFCO – has a strong and altogether commercially reasonable proprietary interest in ensuring that it does not fall into the hands of a competitor who, if nothing else, would find it commercially advantageous to understand how its own plants stood, benchmarked against those of AFFCO.

[64] I accept AFFCO has a strong proprietary interest in the information and that, if passed on, it could be used to a competitor's advantage, including by benchmarking their performance against AFFCO plants throughout New Zealand to identify areas of poor performance. There was no evidence that the information is available outside of AFFCO and I accept that information of this type would not normally be available to a competitor.

Nature of the employees' roles/employers' business

[65] The plaintiffs downplayed the importance of their role within the company and the extent of the information they had access to, and used, during the course of their employment. Comparisons were sought to be drawn between them and Mr Ogg, who is a second tier manager. However, it is clear that both plaintiffs held senior positions. Mr O'Neill managed a plant with a turnover of over 1.17 million stock units per year and employed 615 staff. Mr Warmington managed a plant which had a turnover of 1.2 million stock units per year and employed 597 staff. And while it is true that their roles were focused on the operational side of the business, as plant managers the plaintiffs wrote all the cheques for the plants they managed, and had access to all of the information required to support them in managing multi-million dollar operations. Ms Ogg's evidence supported the pivotal nature of the plant manager's role within the organisation, and the scope of the information available.

[66] It is clear that the business environment in which the defendant operates is highly competitive. None of the witnesses suggested otherwise.

Confidentiality clause in agreement

[67] Each of the plaintiffs' employment agreements contains an identical provision relating to confidentiality. That provision requires that all information concerning the company, its suppliers, clients, and employees be kept confidential and that it is not to be used except in the course of employment with the company. Further, all documents and information obtained or completed during the course of employment were to be returned on departure from the company.

[68] The plaintiffs each gave evidence that they are aware of their ongoing obligations of confidentiality and have complied, and will continue to comply, with them. Mr Winders confirmed that he had received no information from the plaintiffs and that he would not be willing to countenance receiving any. Counsel submitted that where there is already the protection of a confidentiality clause in an agreement and no realistic evidence of the risk of inadvertent disclosure, a restraint of trade provision will not be justified.[7] Reference was made to *DB Breweries Ltd v Marshall*.[8] There, the Court observed that:[9]

> I do not think that the Court should, in circumstances where there is no evidence or even suggestion of a deliberate breach of the restrictions upon confidentiality, give effect to a restraint on employment merely to ensure that there is no possibility of the confidentiality clause being intentionally breached. Not only is there no evidence against Mr Marshall in this regard but such evidence as there is touching upon potential disclosure of confidential information tends to emphasise that Lion in particular as Mr Marshall's prospective employer, will be vigilant to ensure that there is no breach of this covenant by him.

[69] The presence of a confidentiality clause in an agreement does not, of itself, render a restraint of trade provision unreasonable. Whether a restraint of trade provision is reasonable in the circumstances will depend on the facts of the individual case.[10] In dealing with an argument that a restraint of trade provision was unreasonable, as being unnecessary in the presence of an implied contractual

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[7] Citing *Dillon v Chep Handling Systems Ltd* [1995] 2 ERNZ 282 and *Alectus Recruitment Consultants Ltd v Gibson & Anor* AEC 40/97, 8 May 1997.
[8] [1994] 1 ERNZ 98.
[9] At 104-105.
[10] *Allright v Canon New Zealand Ltd* (2008) 6 NZELR 367 at [27].

obligation of confidence and the employee's undertaking that he would not breach that obligation, Judge Colgan in *Television New Zealand Ltd v Bradley*[11] said this:

> Although I accept that it is tendered in good faith I am also satisfied that Mr Kiely is correct that it does not and indeed probably cannot, cover the inadvertent or unintended disclosure of what I am satisfied are arguably elements of confidential information. Although I accept there is no evidence that Mr Bradley has breached the plaintiff's confidentiality or indeed any allegation that this has occurred, it is seriously arguable that he may be unable to adhere to the mutually exclusive obligations of maintaining the confidences of his former employer and performing the duties and meeting the expectations of his new employer to the best of his ability.

[70] A similar approach was adopted in *Allright v Canon New Zealand Ltd*. While there was no evidence before the Court to suggest that Mr Allright had provided, or intended to provide, confidential information to his new employer, Judge Couch considered there was a real possibility of inadvertent disclosure, notwithstanding the plaintiff's contractual obligations of confidentiality. In those circumstances the isolation of Mr Allright from his new employer (Fuji Xerox) was seen as reasonable.[12]

[71] While counsel for the plaintiffs sought to distinguish *Allright* on the facts, it is analogous to the present case in a number of material respects. The plaintiffs are senior employees. They are leaving AFFCO to take up plant manager positions with a company that is in competition with their former employer. The position of plant manager at AFFCO exposed them to, and provided access to, a quantity of commercially sensitive information about the company's operations. While the plaintiffs could not be expected to have retained a precise recollection of the details of each of the reports referred to (absent copying the information), the information that they do have is likely to be of use to Silver Fern Farms.

[72] The difficulties associated with inadvertent disclosure were traversed in *The Littlewoods Organisation Ltd v Harris*.[13] There the English Court of Appeal observed that:[14]

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[11] AEC 14/95, 10 March 1995.
[12] At [29].
[13] [1978] 1 All ER 1026.
[14] At 1033.

> It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.

[73] The risks that arise in relation to inadvertent disclosure in the present case are graphically illustrated by the significant variance of views expressed in evidence between the plaintiffs and Mr Ogg as to what information is proprietary and commercially valuable and what is not. The plaintiffs repeatedly sought to minimise the utility of the information at issue. This enhances the risks identified by the defendant of inadvertent disclosure. And both plaintiffs accepted that there had been prior instances of disclosing information taken from their previous employment – Mr Warmington had disclosed a yield spreadsheet to AFFCO (which Mr Ogg said he continued to find useful, notwithstanding the fact that it was two years old) and Mr O'Neill had previously disclosed a collective employment agreement to a new employer.

[74] I accept too that AFFCO has no way of knowing what information the plaintiff's have accessed, or what (if any) information they have copied. It would be difficult, if not impossible, to ascertain whether any breach of confidence had occurred.

[75] An argument was advanced that industry practice was relevant in assessing the reasonableness or otherwise of a restraint of trade. This submission was developed by reference to Silver Fern Farms' practice of not including a restraint of trade clause in its plant managers' employment agreements and the fact that neither plaintiff had previously been subject to a restraint of trade. I do not consider that the argument materially assists, given the fact specific nature of the enquiry as to reasonableness and, in any event, the evidence falls well short of establishing an industry-wide practice.

[76] Much evidence was directed at what the plaintiffs had done since their employment, had not done, and what they were or were not proposing to do. Given

that the reasonableness of a restraint of trade provision is to be assessed as at the date on which it was entered into, evidence of that sort is of restricted relevance.

Relationships with customers

[77] Counsel made the point that the plaintiffs did not have a significant amount of contact with customers and could be distinguished from salespeople, who not infrequently have restraint of trade clauses enforced against them having regard to concerns about customer details and the like. While it was not suggested that cl 9 was limited in its application to employees who had direct dealings with customers, the reference to customers within cl 9.4 reflected (it was submitted) that this was the primary concern that the company was seeking to address through the provision.

[78] While cl 9 is a standard form provision and refers to customer information and relationships, it is clear that, when read in context, it is focused on protecting the broad proprietary interests of the company (which may include the protection of confidential and commercially sensitive information against misuse and disclosure). Those interests are engaged notwithstanding the fact that the plaintiffs' roles were operational, rather than directed at sales.

Unfair bargaining power?

[79] The question of whether or not the agreement was a fair agreement in all the circumstances or was a one-sided arrangement only entered into because of the superior bargaining power of the employer is relevant to the issue of the reasonableness of the restraint. My findings in relation to the way in which the agreement was entered into have already been expressed, and need not be repeated.

[80] The plaintiffs were both senior and experienced managers at the time of entering into their agreements. They had the opportunity to obtain advice. Despite any reservations they might have held in relation to the restraint of trade provisions, they signed the agreements they had been offered, subject to amendments which they had successfully negotiated.

Adequacy of consideration/geographical scope/timeframe/public interest

[81] Counsel for the plaintiffs accepted that no issue arose in the circumstances of this case as to the adequacy of consideration or geographical scope of the restraint. She also accepted that the timeframe for the restraint was reasonable and was at the lower end in terms of such provisions.

[82] Counsel for the plaintiffs submitted that there was a public interest in the ability of employees to work elsewhere in the employment marketplace and that the law guards against anti-competitive practices. However, there is also a public interest in the sanctity of contract and the enforcement of otherwise reasonable and rational agreements between contractual parties.[15] Having regard to all the circumstances, I do not consider that the public interest would be jeopardised by the modest restraint agreed in this case.

Result

[83] I conclude that the restraint of trade provision in each of the plaintiffs' agreements was reasonably necessary to protect the defendant's proprietary interests.

[84] Clause 9 is clear. Neither plaintiff may engage in work for an organisation in direct competition with AFFCO for a period of three months following the termination of their employment.

[85] The plaintiffs have accepted employment with Silver Fern Farms. There is no dispute that that company is in direct competition with AFFCO.

[86] The plaintiffs freely signed up to their agreements, and are bound by them. The defendant is entitled to enforce the restraint of trade provisions.

[87] Both grounds of the plaintiffs' challenge are accordingly dismissed.

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[15] *Credit Consultants Debt Services NZ Ltd v Wilson (No 3)* [2007] ERNZ 252 at [62].

Costs

[88] The defendant is entitled to costs. If they cannot be agreed between the parties they may be the subject of an exchange of memoranda. Any memorandum filed on behalf of the defendant is to be filed and served within 30 days of the date of this judgment. Any reply is to be filed and served within a further 60 days.

Christina Inglis
Judge

Judgment signed at 12.45pm on 14 February 2012