IN THE EMPLOYMENT COURT
AUCKLAND REGISTRY

[2014] NZEmpC 141
ARC 35/11

IN THE MATTER OF	proceedings removed
AND IN THE MATTER	of an application for disclosure
AND IN THE MATTER	of an application for adjournment
BETWEEN	HALLY LABELS LTD Plaintiff
AND	KEVIN POWELL Defendant

Hearing:	30 July 2014
Appearances:	C Patterson and A Halloran, counsel for plaintiff C Stewart and G Tanner, counsel for defendant
Judgment:	30 July 2014

ORAL INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

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[1] This is a matter involving the second part of proceedings between the parties following a judgment of Judge B S Travis on 13 June 2011. In that judgment Judge Travis made a declaration that the defendant's purported cancellation of the restraint of trade against him was invalid and of no effect. A permanent injunction was issued restraining the defendant from continued breach. Amendments to pleadings were allowed. The other remedies sought by the plaintiff were reserved for a further hearing.

[2] That hearing was set down and commenced before me on 31 March 2014. The five days allocated was a gross underestimate of the time required. The hearing was adjourned part heard after five days and it is now set down to resume on 4 August 2014 for a further eight days of hearing. This of course is all in addition to

the time which was taken to hear the matter before Judge Travis to enable him to make his interim judgment.

[3] At the commencement of the hearing on 31 March 2014, the plaintiff, by consent, was permitted to produce further documents despite having asserted in the period leading up to the hearing that no further relevant documents were in existence. Ms Stewart, counsel for the defendant, despite being given the opportunity to do so, did not seek an adjournment or allege any prejudice from production of the documents at that stage. I have dealt with the production of those documents in an earlier ruling which sets out the steps that I took to ensure that Ms Stewart had adequate time to consider the matter.

[4] The relevance of one or more of those documents to the potential detriment of and prejudice to the defendant became apparent to the defendant and Ms Stewart as the evidence of the plaintiff progressed during the five days of earlier hearing. That has resulted in an application, belatedly made by the defendant, during the recess period since the adjournment of the case part-heard. I say belatedly made because the five day hearing ended on 4 April 2014. The application, which is for further discovery and inspection, was not filed until 27 June 2014, and even then unsupported by affidavit evidence. Such affidavit evidence in support was only filed in response to the opposition and evidence filed by the plaintiff. The defendant's position in respect of these documents was clear when the earlier hearing concluded on 4 April 2014.

[5] In order to give some urgency to the application, I conducted a brief chambers hearing with counsel on 9 July 2014. I had to put aside other pressing matters to conduct that hearing, and accordingly the time available was limited. Following discussion with counsel, there appeared to be some basis to hope that the production of further documents and information sought by the defendant might be capable of being resolved with a joint memorandum being filed. In the time since then, counsel have been unable to agree on the terms under which the matter might be resolved to enable the trial to continue on 4 August 2014.

[6] In summary, the defendant seeks forensic copies of an email account held by the plaintiff for the defendant during the latter period of his employment. In addition the defendant seeks forensic copies of the email account of the witness presently subject to cross-examination, Mr Nigal Tutty. The purpose of this request is to test the reliability of the documents produced and to see whether there are documents held but not yet disclosed, which might give context to the documents produced at the last minute for the hearing which commenced on 31 March 2014; and therefore assistance to the defendant. They might also disclose support for the assertion presently being made by the defendant as to access by others to his email account at the time the documents now produced were created.

[7] The defendant alleges he will be prejudiced in his defence if the application is not granted.

[8] There is a dispute as to the extent of such disclosure and the means by which the plaintiff can procure security for any information arising from the forensic search, but which is confidential and of no relevance in this hearing. This is in the context of the defendant having breached his restraint of trade and now being a senior employee with a company trading in opposition to the plaintiff. That is a real and genuine concern in the circumstances.

[9] As a result of failure to agree to the terms of this further disclosure and Ms Stewart's absence abroad since the chambers hearing on 9 July 2014, the defendant has now filed application for a further adjournment. If the application for further disclosure is granted the provisions of the email accounts at this late stage will allegedly allow insufficient time for the defendant's forensic expert, his counsel Ms Stewart, and he himself to properly analyse the further information in time.

[10] The plaintiff, for obvious reasons, opposes the adjournment. It has filed evidence from a forensic investigator that the information is still easily available and can be analysed in time for the hearing to continue. This matter now has a long history. The plaintiff has an interest in getting the matter concluded. No such urgency rests on the defendant who really has no interest in seeing it concluded. Nevertheless, the plaintiff is itself partly to blame for the present predicament. It

provided the documents giving rise to this present application by the defendant after it had certified that no further relevant documents existed. I note also that in the recess period, it has sought once again to amend its pleadings in view of the issues arising in the way they did from the evidence led so far.

[11] The defendant's forensic expert has now filed an affidavit in reply. There is a clear dispute now between the experts as to the extent of the search required; and the time to do so and analyse the documentation procured. The application by the defendant for forensic copies of emails is determined not only by the issue of relevance but also by what effect an order in favour of the defendant has on the hearing.

[12] While the Evidence Act 2006 is not binding on this Court it has a persuasive effect. Sections 7 and 8 of that Act read as follows:

> **7 Fundamental principle that relevant evidence admissible**
> (1) All relevant evidence is admissible in a proceeding except evidence that is—
> (a) inadmissible under this Act or any other Act; or
> (b) excluded under this Act or any other Act.
> (2) Evidence that is not relevant is not admissible in a proceeding.
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.
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> **8 General exclusion**
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
> (a) have an unfairly prejudicial effect on the proceeding; or
> (b) needlessly prolong the proceeding.
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[13] While sub-section (2) of section 8 does not apply in this case, I consider that in a proceeding such as this the opportunity of the defendant to offer an effective defence is still material in the interests of justice, as is procuring a position which ensures that the plaintiff also has the opportunity of presenting its case.

[14] If the email accounts sought put in context the documentation presently relied on by the plaintiff to the defendant's detriment, then they are relevant. They might

have strong probative value to the defendant. If that is the position they are admissible and indeed should be admitted, unless the circumstances surrounding this application, made so late, have an unfairly prejudicial effect on the proceedings or needlessly prolong it. I must balance that matter having regard to the interests of justice in allowing the defendant to offer an effective defence. Of course in all of this there is a risk to the defendant that inferences can be drawn from the absence of documents he hopes to find or documents discovered which can be read to his detriment. That is a risk he seems prepared to take, after advice from his own counsel.

[15] The defendant has not pursued this matter appropriately since the last adjournment. I am not persuaded by the assertions contained in his affidavit as to the financial stresses he is under being the reason for that delay. This matter should have been pursued far more expeditiously than it has. Nevertheless, I am persuaded by his forensic expert's evidence in support of the application and in reply as to the ease by which the forensic copies sought can be obtained and the potential existence of relevant evidence, which may be uncovered by this process. I am also persuaded, from the affidavits from both sides, that substantial documentation will need to be assessed when the extraction processes are completed.

[16] The security to the plaintiff must, however, be procured. Defence counsel are to give an irrevocable undertaking in writing that they will not reveal any information procured under this process to their client, the defendant, or his present employer, without agreement in writing from the plaintiff's counsel, or further order of the Court. The defendant's expert, Mr Jon Pearse, is to give a similar undertaking in writing. The defendant is to have no access to any of the documentation until this extraction and analysis process has been complied with. Obviously if documents are uncovered, which are relevant and will be produced at the resumed hearing, then at that stage the defendant, but again with appropriate written undertakings from him, should be permitted to see them in order to assist his counsel. Otherwise, it seems to me the cleanest way to deal with this matter is to grant the orders that are sought with some amendment. This includes, regrettably, the application for an adjournment.

[17] I realise this will cause inconvenience to the plaintiff at this stage. I interpolate that there is a witness who is presently under the restrictions imposed by being under cross-examination. However, the plaintiff is partly responsible for this situation arising. Reluctantly, I have to accept that there will be insufficient time available for the procurement and analysis of this information before the hearing is due to recommence. It is accordingly adjourned. I make that decision, I am bound to say, on the finest of margins in favour of the defendant. This adjournment is not only inconvenient to the parties but to the Court as there is insufficient time now to fill the void with other fixtures. It is unlikely, I add, that a further fixture in this matter can be allocated until next year.

[18] There is one other issue which needs to be considered. This relates to a ruling, which I delivered orally during the course of the earlier five day hearing. The ruling was delivered on 3 April 2014. The ruling related to the question of admissibility of an email which was part of the documents produced to the Court on the day of the commencement of the hearing, to which I have already referred. It appeared that there were both redacted and unredacted versions of an attachment to this email. While the redacted version was contained in the hard copy bundle of documents at the hearing, the unredacted version was nevertheless available to the Court in the electronic versions of the documents made available by the discovery process. As a result of a dispute over whether the Court should be entitled to view the unredacted version, Ms Stewart gave notice that she would make an application for unrestricted access to the plaintiff's hard drive by the defendant IT expert so that the defendant could respond to the assertions relating to that document. That would, of course, have substantially delayed the continuation of the hearing and the ruling which I made was in an effort, partly, to reach some compromise and not to prolong the hearing further. The ruling I made was that the Court would only view the redacted version of the particular document, which was contained in the bundle of hard copy documents.

[19] The plaintiff, in view of the fact that the defendant through his IT expert will now have access to the documents that I have earlier dealt with in this present Judgment, makes an application that I revisit the earlier Ruling.

[20] Ms Stewart makes the submission that if I do revisit the Ruling and allow the unredacted version of the email to be read as part of the evidence, then that would result in a need to widen the extent to which the defendant should have access to forensic copies of documents held by the plaintiff. However, I do not accept that the need to widen the access beyond the period or accounts sought in the defendant's present application results from the Court changing its view as to the acceptance of that particular document. To do so on the basis submitted by Ms Stewart would simply be to endorse a widespread fishing expedition for documents. The type of evidence she would seek to find can easily be procured from witnesses as we discussed during the course of argument. The document in question was part of the bundle of documents which was produced on the first day of the hearing and it is that bundle of documents to which the defendant's present application relates. In the same way that I have ruled on the basis of the need for all relevant evidence to be available to the defendant in defending the plaintiff's claim, it is also appropriate, in the interests of justice, that all relevant evidence in support of the plaintiff's claim be available. In view of the adjournment, one of the primary reasons for my earlier Ruling is removed. Accordingly, I set that earlier Ruling aside and I rule that the plaintiff is entitled to produce the unredacted version of the document in question. The search for other forensic documents which is now to be undertaken will include a search for documents which may put the unredacted version of the email attachment into context and provide evidence as to its reliability.

[21] I would hope that in respect of the undertakings to be provided, the parties, with advice from counsel, can agree on sensible wording, having regard to commonsense. However, if there is any dispute, leave is reserved to refer those matters back to the Court.

[22] I further direct that there be communication and cooperation between the parties' experts to expedite the process now required. I make this ruling because there seems to be some misunderstanding of the information available from the plaintiff to meet the defendant's application. Mr Powell's email account is no longer current. There is no back up account, I am informed, but the information may be procured from an after mail archive system held by the plaintiff's IT support

company or expert. Mr Tutty's email account, prior to 7 December 2010, is also only sourced from that after mail archive system.

[23] I also questioned the time from which the emails are to be sourced. Ms Stewart has confirmed from the defendant's expert and I agree that the email should be sourced from the date when the plaintiff's last computer system was installed in 2009. The respective experts communicating with each other and cooperating as to the method of extracting this information will also assist.

[24] Costs are reserved, but all of these matters will be reconsidered when the Court comes to consider costs. I give notice that costs for these particular matters that I have dealt with today will not necessarily be determined on the basis of the eventual outcome of the proceedings on their merits; and so neither party should take any comfort from that statement. I will now deal with the wording draft order in consultation with counsel.

M E Perkins
Judge

Judgment delivered at 4.20 pm on 30 July 2014