

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 179  
EMPC 334/2020**

IN THE MATTER OF	an application for a search order
BETWEEN	TPT FORESTS LIMITED Applicant
AND	CRAIG PENFOLD First Respondent
AND	SIMON STRONGE Second Respondent

Hearing: (on the papers)

Appearances: R Upton, counsel for the applicant

Judgment: 5 November 2020

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**JUDGMENT OF JUDGE J C HOLDEN  
(Application for a search order)**

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[1] The applicant, TPT Forests Ltd (TPT), is a registered company which previously employed both respondents.

[2] TPT now makes application for search orders in relation to the respondents.

[3] In addition to the application and supporting documents, including an undertaking as to damages and affidavits, TPT has filed a draft search order and a draft statement of problem, which it proposes filing with the Employment Relations Authority (the Authority) if the search orders are granted and after they have been executed.

[4] The Court has jurisdiction to make search orders pursuant to s 190(3) of the Employment Relations Act 2000 (the Act). Rules 33.2 and 33.3 of the High Court Rules 2016 provide the basis for a search order and the criteria that the Court must consider and be persuaded of to make such orders.

[5] TPT claims that the respondents have breached their contractual obligations by unlawfully accessing confidential information; retaining TPT's property (in particular confidential information and/or intellectual property); disclosing confidential information to third parties; and deleting and/or destroying TPT's property (in particular its intellectual property).

[6] TPT alleges that the second respondent, Mr Stronge, also has breached his obligation of good faith and his obligation of fidelity.

[7] I am satisfied that it is proper for the application to be considered urgently, without notice to the respondents. I am also satisfied that there are proposed proceedings to which the order can relate.

### **Mr Penfold and Mr Strange are former employees of TPT**

[8] Mr Penfold, the first respondent, was employed by TPT from 20 May 2018 until 8 July 2019. He was employed in the position of Market Manager.

[9] Mr Penfold was dismissed by letter dated 8 July 2019, essentially for failing to cooperate with an investigation TPT had initiated into various allegations regarding the conduct of TPT's China-based employees.

[10] It seems that, prior to his departure, while Mr Penfold was on leave, he forwarded a large number of attachments from his work email to his personal email. He then apparently deleted the sent emails not only from the "Sent Items" folder, but also from the "Deleted Items" folder.

[11] In the letter of dismissal, TPT required Mr Penfold to immediately delete all electronic material relating to TPT's business from his personal computer systems and

storage devices and/or facilities. It also reminded Mr Penfold of his obligations to respect the confidentiality of TPT's information.

[12] Mr Stronge, the second respondent, was employed by TPT from 2007 until 31 March 2020, when after discussions between TPT and Mr Stronge, Mr Stronge resigned. At the time his employment ended, he was the International Sales and Operations and Sales Support Manager.

[13] TPT wrote to Mr Stronge when his employment ended, requiring him to return all TPT's property in his possession or under his control, as well as to immediately delete all electronic material relating to TPT's business from his personal computer system and storage devices and/or facilities.

[14] As with Mr Penfold, Mr Stronge was reminded of his confidentiality obligations to TPT.

### **Concerns arose**

[15] In mid-May 2020, TPT became aware of rumours that its most important client was about to terminate its contract with TPT. TPT discussed those rumours with that client and initially they appeared to be unfounded. However, on 26 May 2020 the client gave TPT three months' notice of the termination of the contract between them.

[16] This led to an investigation by TPT into the circumstances of the termination. It was during that investigation that TPT became concerned that the respondents had interfered with TPT's relationship with the client and may have influenced or contributed to it deciding to terminate its contract.

[17] From a broader perspective, TPT became concerned that the respondents may have been supplying confidential client information to other clients and were placing pressure on those clients to stop dealing with TPT. TPT understood the respondents were making allegations that TPT considered to be untrue and using information and data that they had taken unlawfully from TPT.

[18] As part of its investigation, TPT instructed a computer forensic investigator, Brent Whale of Computer Forensic Solutions Ltd, to clone the laptop computers that the respondents had used while employed by TPT, and to investigate whether there had been deletions or concealment of files onto other devices. Mr Whale later was asked to extend his investigations to consider whether there had been any mass deletion of information from the computer devices.

[19] Mr Whale has provided evidence that, based on his investigations, he is confident that both laptop computers:

- (a) have had USB mass storage devices attached to them;
- (b) have had one of those USBs attached to both laptops; and
- (c) have had significant amounts of information deleted from them.

[20] TPT also became aware of emails between the respondents and one of TPT's main competitors that indicated that the respondents had retained information and data that would allow them to put together a supply profile for TPT's clients, including the main client who had terminated its contract with TPT.

[21] As a result, TPT instructed its solicitors to file proceedings against both respondents in the Authority. The draft statement of problem supplied to the Court shows TPT will seek:

- (a) a determination that the first and/or second respondents have breached obligations that they owe to TPT;
- (b) an award of a penalty for each and every breach that the respondents have committed;
- (c) an order that the penalties be paid to TPT;
- (d) an immediate compliance order, requiring the respondents to consistently comply with their ongoing confidentiality obligations;

- (e) an immediate compliance order, requiring the respondents to consistently comply with their obligation to return all company property following termination of their employment;
- (f) an award of special damages in relation to third party costs associated with the applicant investigating the respondents' actions; and
- (g) costs.

[22] TPT says that it is taking this action because it believes that the respondents have acted unlawfully and have breached numerous obligations they have towards TPT. They allege that the respondents have used confidential information obtained while working at TPT to fabricate and undermine TPT's business with key clients, leading to TPT's largest contract being terminated. TPT says that it appears to it that by going to several clients, the respondents were planning to discredit TPT with the intention of establishing a competing business to take over from TPT for their own gain. To the extent the respondents' actions did contribute to the contract termination, TPT says those actions have impacted on TPT employees and their families as staff have been made redundant as a result of the downsizing required because of the loss of the contract with TPT's main client.

[23] Mr Procter, for TPT, acknowledges that the respondents may point to a business reason for their actions in relation to their laptops and/or may suggest some sort of whistle blower defence in respect of their other actions. He does so because an applicant for an ex parte search order must disclose to the Court any possible defences known to it.<sup>1</sup>

### **Search order made**

[24] TPT has provided evidence demonstrating that it has a strong prima facie case that the respondents have breached their obligations to it. The evidence also demonstrates that the potential or actual loss or damage to TPT will be serious if the search order is not made. There is evidence that the respondents possess relevant

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<sup>1</sup> High Court Rules 2016, r 33.5(4)(a).

evidential material and, based on their conduct to date, that they might destroy that material or cause it to be unavailable for use in the anticipated proceedings.

[25] The draft search order filed by the applicant follows the form in the High Court Rules and is appropriate.<sup>2</sup>

[26] Accordingly, a search order is made in the terms specified in the application and contained in the draft search order.

[27] At 9.30 am on 24 November 2020, the Court will consider a report on the search from the independent solicitors, Ms Grice and Mr Hakaria. TPT, Mr Penfold, Mr Stronge and the independent solicitors are all entitled to be heard on that date. The other matters specified in the order will also be considered at that hearing.

[28] A copy of this judgment is to be served on each respondent with the search orders and other documents filed in these proceedings, when the search orders are executed. TPT also must provide a copy of this judgment to the independent solicitors.

[29] Once the search orders are executed, the statement of problem must then be filed with the Authority.

[30] This judgment is not to be published other than to the parties, their representatives, the independent solicitors and the IT experts employed in this matter, until further order of the Court.

[31] Costs are reserved.

J C Holden  
Judge

Judgment signed at 9 am on 5 November 2020

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<sup>2</sup> High Court Rules 2016, form G 39.