

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 222
EMPC 319/2020**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	HAIG DAVID CHARLES FLASHOFF First Plaintiff
AND	DONALD PETER PRICE Second Plaintiff
AND	RAYMOND REGINALD TAYLOR Third Plaintiff
AND	SEAN GLASSPOOL Fourth Plaintiff
AND	ENGAGE TECHNOLOGY LIMITED Fifth Plaintiff
AND	NEW ZEALAND TECHNOLOGY GROUP HAWKES BAY LIMITED Defendant

EMPC 320/2020

IN THE MATTER OF	an application for discharge of freezing order
BETWEEN	NEW ZEALAND TECHNOLOGY GROUP HAWKES BAY LIMITED Applicant
AND	HAIG DAVID CHARLES FLASHOFF First Respondent
AND	DONALD PETER PRICE Second Respondent
AND	RAYMOND REGINALD TAYLOR Third Respondent

AND

SEAN GLASSPOOL
Fourth Respondent

AND

ENGAGE TECHNOLOGY LIMITED
Fifth Respondent

Hearing: 1 December 2020
(heard at Wellington)

Appearances: M Hammond and K McLuskie, counsel for New Zealand
Technology Group Hawkes Bay Limited
S Bisley, N Cuervo and J Maltby, counsel for H Flashoff, D Price,
R Taylor and Engage Technology Limited

Judgment: 7 December 2020

Reasons: 9 December 2020

REASONS FOR JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Before the Court is a challenge to an interim injunction ordered by the Employment Relations Authority,¹ and an application for discharge of a freezing order made previously by the Court. I advised the parties of the outcome of both proceedings on 7 December 2020, and this judgment records my reasons for doing so.

Background

[2] By way of brief overview, New Zealand Technology Group Hawkes Bay Ltd (NZTG) provides ICT services to small to medium sized businesses in the Hawkes Bay. It was created as one of a planned network of regional companies across the country. Its director, Mr Dwayne Smith, identified local entities in the Hawkes Bay area that provided ICT services. He proposed that NZTG acquire their assets and businesses, and then employ relevant personnel. Those approached were Mr Haig

¹ *NZ Technology Group Hawkes Bay Ltd v Flashoff* [2020] NZERA 388 (Member O’Sullivan).

Flashoff (of Mint Technologies Ltd, (Mint)), Mr Donald Price (owner of Wasp New Zealand Ltd, (WASP)) and Mr Raymond Taylor (owner of Taylor Communications Ltd, (Taylor Communications)), the first, second and third respondents.

[3] In 2017, agreements for sale and purchase relating to those entities were entered into. At the same time, individual employment agreements (IEA) were signed between NZTG and various individuals including Messrs Flashoff, Price and Taylor.

[4] The fourth respondent, Mr Sean Glasspool, also became an employee of NZTG. Previously, he worked for Mr Peter Dunkerley (owner of Need a Nerd Ltd (NAN)). Mr Dunkerley's business became associated with NZTG via a Memorandum of Understanding (MoU). Mr Dunkerley did not become an employee of NZTG, but Mr Glasspool did.

[5] There is a dispute as to the extent to which the commercial agreements were implemented, and as to the nature of the combined arrangements which operated from 2017 to 2020.

[6] On 7 September 2020, Messrs Flashoff, Price, Taylor and Glasspool wrote to NZTG resigning as employees with immediate effect. NZTG also received a letter on the same day sent on behalf of the first to third respondents, and Mr Dunkerley, stating they were rescinding and/or cancelling their respective contracts with NZTG due to failures to carry out various contracted obligations. They said they were very concerned with the financial and operational state of NZTG, that they were taking only the customers they had brought into the group and that they were transferring their respective businesses to a new entity: Engage Technology Ltd (Engage), the fifth respondent. They also said they wished to work through any issues in good faith.

[7] The first to fourth respondents, together with 18 other employees, vacated NZTG's premises removing certain assets which they say was their own property. NZTG strongly contests this, asserting that those assets had become their property under the various arrangements entered into by the parties.

Procedural history

[8] Soon after, on 10 September 2020, NZTG filed a statement of problem in the Authority asserting that the first to fourth respondents had breached their individual employment agreements (IEAs) in multiple respects; a range of declarations and orders including damages and penalties were sought. An application for an interim injunction without notice was also filed. The Authority directed that it be considered on notice at an investigation meeting which was scheduled for 23 September 2020. The application was opposed by the respondents.

[9] On 29 September 2020, the Authority granted NZTG's application for an interim injunction.² The order made by the Authority required the first to fourth respondents to comply with the employment agreements they had entered into; that is, they were not to use or take confidential information of NZTG, nor solicit its clients; they were to return company property; and three of the respondents were not to work within a 50 km radius of NZTG's offices for a business in the same industry.

[10] As a result, some items were returned. However, a significant dispute as to the ownership of other assets then developed.

[11] As a result, on 5 October 2020, NZTG filed a further statement of problem in the Authority, seeking compliance orders in respect of the interim injunction.

[12] At a later stage, an application was made to the Authority by the respondents for removal of both the substantive proceeding and the application for a compliance order to this Court. NZTG agreed the substantive proceeding could be transferred, but not the compliance proceeding. In the event the Authority determined that all outstanding matters be removed to this Court, in a determination of 11 November 2020.³

[13] Turning to the position in the Court, on 13 October 2020 the respondents filed a non-de novo challenge to the interim injunction, in brief form.

² *NZ Technology Group Hawkes Bay Ltd v Flashoff*, above n 1.

³ *NZ Technology Group Hawkes Bay Ltd v Flashoff* [2020] NZERA 463 (Member O'Sullivan).

[14] Two days later on 15 October 2020, NZTG filed an ex parte application for a freezing order in which it was argued orders should be made urgently and without notice having regard to what was alleged to be the respondents' high-handed conduct. The application was granted on 16 October 2020, on the basis it would subsist for a short period only. The terms of the order froze funds held in any bank account in the names of the first to fifth respondents. Leave was reserved to any respondent to apply on short notice for variation; the order was also to be reviewed a few days later.⁴

[15] After modifying the order following an application to that effect from the respondents, on 20 October 2020, an application for variation was considered on an inter-partes basis on 22 October 2020. After hearing the parties, the freezing order was amended again, and a timetable was established for the hearing of an application for its discharge. It was also agreed the respondents' challenge to the interim injunction should be heard at the same time. The hearing was initially scheduled for 5 November 2020, but at the request of the parties who required more time to prepare, the fixture was rescheduled for 1 December 2020.

[16] Voluminous affidavits, exhibits and submissions were filed by all parties. In submissions which NZTG filed shortly before the hearing, the company advised that it did not oppose the application for discharge made by Mr Glasspool. Accordingly, the order insofar as it affected him was discharged on 30 November 2020.⁵ He did not therefore participate further with regard to the present issues.

Anticipated further steps

[17] The parties are still at the stage of framing their claims against each other.

[18] As far as the proceeding in the Court is concerned, there is a timetable running for the filing of pleadings in respect of NZTG's substantive claim, as removed by the Authority.

[19] Mr Bisley, counsel for the respondents, told the Court that personal grievances

⁴ *NZ Technology Group Hawkes Bay Ltd v Flashoff* [2020] NZEmpC 170.

⁵ *NZ Technology Group Hawkes Bay Ltd v Flashoff* [2020] NZEmpC 209.

were in the course of being raised by the employees he represents, and that it is anticipated these may become the subject of a counterclaim in the proceedings before the Court. I make no comment as to whether that will be possible from a procedural point of view, noting that such a claim would normally commence in the Authority.

[20] He also advised that a set of High Court proceedings was about to be filed and served. He confirmed the various business entities would claim the relevant sale and purchase agreements were never completed. It would be pleaded that significant misrepresentations were made to the business owners as to NZTG's turnover and net worth. It would also be alleged that certain assets owned by WASP, Mint, Taylor Communications and/or Engage were not subject to the sale and purchase agreements, including a substantial wireless network developed by Taylor Communications, and assets owned by NAN. Counsel said those parties will seek declarations that ownership of assets did not transfer to NZTG and that the sale and purchase agreements should be rescinded. Damages would be claimed for the alleged misrepresentations. It is common ground that these commercial issues will have to be resolved in the High Court and not the Employment Court.

[21] Two issues will arise. The first is whether the hearing in respect of the intended claims in the High Court should proceed before the hearing of employment-related issues in this Court. Second, whatever sequence is adopted, what is the likely timeframe for the disposition of both the High Court and/or the Employment Court proceedings?

[22] No firm answer can be given to that question at present, but all are agreed that the period for disposition of both sets of proceedings is likely to be lengthy.

[23] The relevance of this issue for present purposes is that although any interlocutory orders made at this stage would subsist until further order of the Court, if made, it is likely they would need to remain in place for quite some time. My provisional view is it is likely the High Court action would have to be resolved first, and that a hearing in this Court would be unlikely to take place until early 2022, at the earliest.

The hearing

[24] Comprehensive submissions were presented to the Court at the hearing on 1 December 2020. There was also discussion with counsel about undertakings which might be given by the respondents to the applicant to preserve the value of the various businesses while the parties' claims are resolved without the necessity of orders, a possibility which the parties had considered prior to the hearing. It was agreed the parties should have a further opportunity to explore such an option. Accordingly, I renewed the freezing order to noon on 7 December 2020. I indicated it was my intention that if the parties were unable to agree undertakings, I would then issue a short judgment explaining my conclusions one way or the other, with reasons to follow. This process would be adopted so the parties knew where they stood as soon as possible.

[25] Late on 4 December 2020 I received memoranda from counsel which confirmed agreement had not been reached as to the content of undertakings. Accordingly, on 7 December 2020, I issued a judgment indicating that the challenge to the Authority's injunction determination was established; and that the freezing order was discharged.⁶ The freezing order lapsed at noon that day. I now explain my reasons for these conclusions.

Key facts

Preliminary matters

[26] Before summarising the key facts, I make some preliminary observations.

[27] The first is to reinforce the obvious point that both matters before the Court are interlocutory in nature. That means the evidence has been presented in affidavit form. The descriptions of events provided by each party are fulsome, with references to the significant volume of documents which were produced. But all the evidence is untested.

⁶ *Flashoff v NZ Technology Group Hawkes Bay Ltd* [2020] NZEmpC 220.

[28] With regard to the injunction, I remind myself that the Court will not try to resolve conflicts of evidence about the facts on which the claims of either party may ultimately depend, nor decide difficult questions of law which will call for detailed argument and mature consideration. These are matters which must be dealt with at trial.⁷

[29] Similarly, with regard to the freezing order issues. In that context, allegations with regard to a proposed claim must be capable of tenable argument, and supported by sufficient evidence, but the sufficiency of evidence must reflect the early stage of the proceeding.⁸

[30] In short, the views of the Court on the present interlocutory matters are necessarily provisional.

[31] Next, whilst different considerations relate to the two proceedings which are before the Court, there is nonetheless an overlap in the circumstances pertaining to each, so that it is convenient to summarise the underlying facts before assessing each interlocutory issue.

[32] That said, there is a divergence between the parties as to the relevance of some aspects of the chronology.

[33] For NZTG it is argued that the primary focus must be on the terms of the IEAs entered into by the first to fourth respondents; and that the underlying arrangements are contextual only. For the respondents, it is argued that the IEAs were linked to the commercial agreements, and that if they are invalid, so are the various post-employment obligations of the IEAs. On either basis it is necessary to set out the context in some detail.

NZTG's initiative in the Hawkes Bay

[34] Mr Smith envisaged the creation of 16 regional companies that would in turn

⁷ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 407.

⁸ *Dotcom v Twentieth Century Fox Film Corporation* [2014] NZCA 509 at [18].

form a national group which would either be listed on the New Zealand Stock Exchange or sold to a third party within five years. One of these would be the Hawkes Bay company, which would consist of local businesses acquired by NZTG. Mr Smith and incoming business owners would be shareholders of NZTG.

[35] Five entities became involved in this initiative. The circumstances of each differ in some respects, so it is necessary to describe them individually.

[36] The first is WASP. Mr Price is the sole director and majority shareholder of this entity. From 1996 it provided a large wireless broadband network to hundreds of customers in the Hawkes Bay, and IT services to several hundred hardware customers.

[37] On 26 July 2016, the company signed an agreement for sale and purchase with NZTG. This was the first of the series of agreements entered into. The purchase price of \$500,000 was to be paid by the issue of 475,000 one-dollar shares in NZTG to Mr Price, and a cash payment of \$25,000 with an option to convert the cash into shares. The possession date was 31 August 2016; under the agreement, settlement was to proceed on the same date.

[38] On the first 12-month anniversary of the agreement, stated as being 1 August 2017, a goodwill calculation of NZTG would be undertaken which would lead to a necessary reduction or increase in shares held by Mr Price.

[39] The assets to be sold under the agreement included WASP's transmitter sites and equipment, though not its brand. Tangible assets were valued at approximately \$50,000; intangible assets at approximately \$200,000 and stock in trade \$50,000. Mr Price would become a director of NZTG, together with the existing director of that company, Mr Smith. Mr Price and other WASP employees would become employees of NZTG.

[40] Taylor Communications was an ISP network services company which owned and operated a large wireless broadband network in the Hawkes Bay. The entity is owned by Mr Taylor. This company entered into an agreement for sale and purchase in similar form to that of WASP. The agreement was dated 21 August 2017, with a

possession date, and thus a settlement date, of 1 October 2017. The consideration was \$505,000, with no deposit being payable.

[41] There was a similar process for valuation of the business and adjustment of the proposed shares for Mr Taylor, although in this instance the formula for doing so was described more fully. At the same time, Mr Taylor and another company employee would enter into IEAs with NZTG. Tangible assets were sold for \$25,000, which included vehicles. Its wireless network and transmitters were not referred to. Intangible assets were sold for \$500,000.

[42] The third entity is Mint. It had delivered IT products to support small and medium-sized enterprises in Hawkes Bay for some years. By 2017, it had approximately 40 clients. It is owned by Mr Flashoff.

[43] Following negotiations, Mint and NZTG entered into a sale and purchase agreement on 31 August 2017. The possession date, and thus the settlement date was 1 September 2017. Intangible assets were sold for \$40,000. A collateral agreement was entered into on the same date which provided for a calculation 12 months later which would be used as the basis for what Mr Flashoff described as being the final purchase price; that price would be converted to NZTG shares to be held by Mr Flashoff's family trust.

[44] It was also recorded a shareholders agreement would be entered into on or before 31 December 2017. In the event an agreement as to either the share allocation or a Shareholders Agreement could not be concluded before 31 March 2018, the parties agreed to assign all contracts originally acquired from Mint back to it, and the \$40,000 referred to in the agreement for sale and purchase would be repaid, so that the parties would be returned to their original positions.

[45] The evidence is that the initial sum of \$40,000 which NZTG was to pay, and did, was to discharge a bank overdraft.

[46] Mint's employees, including Mr Flashoff, were to enter into employment agreements.

[47] On 1 May 2018, Mint was placed in liquidation by shareholder resolution. In one of his affidavits, Mr Flashoff said he was negotiating with the liquidator to obtain an assignment of Mint's claims against NZTG.

[48] The circumstances of NAN are different, but the steps taken with regard to it were placed before the Court to complete the description of the multiple arrangements which were entered into with NZTG.

[49] NAN provides IT support to commercial and home customers. It operates nationally through different franchises. Need a Nerd Licencing Ltd owns the IP for the Need a Nerd brand. In the Hawkes Bay, Mr Dunkerley's son owned and operated NAN; he purchased it from his son in late 2011, and the franchise in 2015.

[50] On 31 March 2017, NAN entered into a MoU with NZTG, which contemplated further agreements. First, it was anticipated there would be a sale and purchase agreement for the sale of NAN's business to NZTG. Second, there would be a shareholders agreement which was described at that date as being 99% completed, under which Mr Dunkerley would become a shareholder in NZTG along with employment agreements under which NAN staff would become employees of NZTG. It was expected that the shareholders agreement would be finished and signed by all existing parties before the end of "April", apparently a reference to April 2017.

Business operations from 2017 to 2020

[51] Some steps were taken in light of the foregoing arrangements, and some were not.

[52] The first to fourth respondents became employees of NZTG by signing the IEAs anticipated in the various documents I have summarised, as did the staff of the various companies.

[53] The businesses were combined, all operating in conjunction with NZTG.

[54] However, the respondents say that NZTG failed to honour the majority of its obligations because:

- a) Other than \$40,000 paid to Mint, the purchase prices for the various businesses were never paid;
- b) Messrs Price, Taylor, Flashoff or their associated interests did not acquire any shares in NZTG;
- c) no shareholders agreement was agreed; and
- d) Mr Price was not appointed as a director of NZTG.

[55] They also say that after entering into these various arrangements, WASP, Mint, Taylor Communications and NAN were administered separately to NZTG itself. Thus:

- a) Taylor Communications continued to use its own accounting and billing services, with NZTG providing some back-office services;
- b) WASP used its existing branding and employees to provide services to its customers, with NZTG providing back-office services;
- c) Mint was operated under the NZTG umbrella, with back-office services being purchased from it; and
- d) NAN operated under its own branding, with NZTG providing support.

[56] NZTG, through Mr Smith, strongly contests these assertions. He says tangible, and intangible assets such as customer lists, passed from WASP, Mint, Taylor Communications and NAN to NZTG. He believes these conclusions are clearly available on a proper analysis of what actually occurred. He says NZTG operated each and every business. He refers to minutes headed "Hawkes Bay Partner Team Minutes", in which Messrs Price, Flashoff, Taylor and Dunkerley were involved, which confirm, he says, that property passed which they then managed on a joint basis. He also refers to evidence which he says shows the progress and steps which were taken to resolve outstanding issues, including steps to value NZTG shares as required

under the agreements for sale and purchase, and the drafting of an acceptable shareholders agreement.

[57] Matters came to a head, however, in mid-2020. The respondents say that the core obligations under the various 2017 documents had still not been concluded, and there were developing concerns about NZTG's business and invoicing practices. There were also, they say, serious concerns about NZTG's finances, as more recently verified by a chartered accountant retained for the respondents.

[58] Again, Mr Smith does not agree. He says he has worked assiduously with the first to third respondents to resolve the issues, and that until recently, no indication had been given by them to indicate they were dissatisfied to the extent of wishing to unwind the steps that had been taken. He also refers to the provision in the Mint documentation which specifically contemplated the possibility of that particular transaction being unwound and points out that Mr Flashoff had taken no step under that provision.

[59] In March 2019, Mr Smith had presented to the business owners a revised shareholders' agreement. They take the view that it, firstly, acknowledged that the business and assets of the various businesses had not in fact been purchased, and that consideration for doing so would be satisfied by the issuing of shares, which had plainly not yet occurred. They also considered that under the draft agreement, their interests as shareholders would be significantly diluted, because other "founder" shares were to be allocated to Auckland-based shareholders, a possibility which had not previously been raised.

[60] A face-to-face meeting with the Auckland shareholders to discuss unresolved issues was proposed by Mr Flashoff and his colleagues. However, not all of the Auckland shareholders agreed to attend. The respondents then decided to exit NZTG. A meeting was proposed for July 2020, to discuss how this might occur.

[61] The respondents say in that meeting, and in subsequent communications over the next two months, agreement as to financial issues could not be reached. They concluded that the Auckland partners and Mr Smith were no longer interested in a

good faith discussion to resolve matters. Accordingly, they decided to proceed with their previously stated plan to withdraw from NZTG by taking their businesses and customers, and to set up a new merged entity, which was Engage. This duly occurred from 7 September 2020.

[62] For NZTG, it is submitted the business owners did not engage with Mr Smith in good faith, removing property which plainly belonged to it. The company's position is encapsulated in a letter sent by its lawyers to the respondents' lawyer on 13 November 2020 in which, it was recorded that the ex-employees had proceeded for some years on the basis that all the assets and property from each of the acquired businesses had indeed been transferred to NZTG; and that to now argue the assets and client lists somehow sat outside the company for all these years, enabling them to take what they claim was theirs, lacked credibility. The lawyer said the respondents would have an uphill struggle persuading the High Court that the last four years could simply be unwound, which is what they would need to establish.

First issue: challenge to order of injunction made by the Authority

[63] In its determination, the Authority correctly considered the usual criteria relating to interim injunctions: serious question, balance of convenience and overall justice.⁹

[64] With regard to the first issue, it noted submissions made for the respondents that their employment agreements were subject to completion of the underlying commercial contracts, and that NZTG had not provided a satisfactory evidential basis for concluding that it had a property interest that required protection. But the Authority put those issues to one side on the basis that they were not for it to consider. It focused only on the IEAs. The Authority determined the company had a strongly arguable case if due regard was to be given to the post-employment obligations contained in the IEA. Implicit in its conclusion was an assumption that NZTG owned property which required protection.¹⁰

⁹ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90.

¹⁰ *NZ Technology Group Hawkes Bay Ltd v Flashoff*, above n 1, at [21].

[65] Turning to balance of convenience, the Authority considered whether damages would be an adequate remedy. It again proceeded on the basis that NZTG owned property which the respondents had removed, including proprietary rights in respect of customers. It concluded that if for some reason none of the non-solicitation and/or restraint provisions were enforceable, any loss suffered by the respondents could easily be assessed. If, on the other hand, the various provisions were enforceable, it is likely NZTG's business would have been significantly damaged in the interim; the company might not be able to be put back in the position that applied previously, when it thought it had the advantage and security of clearly expressed contractual restraints. The Authority also considered that NZTG's strongly arguable case in respect of the IEAs was relevant to the balance of convenience, which it held favoured the company.¹¹

[66] In assessing overall justice, the Authority again referred to what is described as NZTG's strongly arguable case. It said it was to be inferred from the respondents' submission that the employment agreements were some sort of device. The Authority concluded there was, in fact, a well-documented employment relationship in place which contained clear contractual provisions that were to apply after the termination of employment. These factors weighed in favour of granting the orders sought.¹²

[67] The Authority accordingly ordered Messrs Flashoff, Price, Taylor and Glasspool to comply with specific provisions of their IEAs relating to property and confidential information. The provisions required the three respondents to:

- a) Prevent the disclosure of "confidential information", and not use that for their benefit. Confidential information was broadly defined as any information relating to "the business or financial affairs of the employer or other companies" that came to the employees' knowledge in confidence.
- b) Return NZTG's property, as supplied to them by that entity, at the end of their employment.

¹¹ At [26] and [27].

¹² At [28].

- c) In the case of Mr Flashoff, Mr Taylor and Mr Glasspool, not to compete with NZTG within a 50 km radius of NZTG's office, for six months.
- d) Not to solicit employees, contractors or clients of NZTG for 12 months following the end of their employment.

[68] The Authority made orders in terms of these provisions. No description of the property to be returned was incorporated in the Authority's order.¹³

[69] In the statement of claim which raises the non-de novo challenge, the respondents allege the Authority erred in fact or law in several respects; in summary:

- a) the orders made were beyond the Authority's jurisdiction;
- b) they lacked specificity so that the respondents did not know what they were supposed to do or not do;
- c) they referred to relevant clauses of the IEA and no more; and
- d) the orders made were not available in interim proceedings.

[70] For NZTG, it was submitted that the issues raised in the non de novo challenge were confined to the issue as to jurisdiction, and as to whether the injunction was sufficiently precise as to the property to be returned to NZTG. In my view, although the pleading is not as well expressed as might have been, the allegations require the Court not only to consider whether the Authority had jurisdiction, but whether it erred in its assessment of interim injunction factors in law and/or in fact, so leading it to make orders that were not available in the particular circumstances. That is how the case was presented by both parties, and I proceed accordingly.

¹³ At [29].

[71] It appears to be common ground that when considering an interim injunction assessment on appeal, observations made by the Court of Appeal in *NZ Tax Refunds* apply.¹⁴ I agree. The Court relevantly stated:¹⁵

The grant of an interim injunction involves, of course, the exercise of a discretion. Such a decision is amenable to appeal, on the basis that the Judge has erred in law, taken account of an irrelevant matter, failed to take account of a relevant matter or is plainly wrong. This is subject to the qualification, however, that whether there is a serious question to be tried is an issue which calls for judicial evaluation rather than the exercise of a discretion. Where an appellate court disagrees with a Judge's finding that there is no serious issue to be tried, the appellate court will have to carry out its own assessment of the balance of convenience and the overall justice of the case, although it may well derive assistance from the Judge's analysis of these aspects.

[72] The final preliminary issue which was debated between counsel relates to the correct approach when the possibility of making a mandatory order is under consideration. The orthodox view is that such injunctions are often more difficult to obtain, because they do not preserve the status quo.¹⁶ The proposition has often been relied on in this jurisdiction. For example, in *Korbond Industries Ltd v Jenkins*, Judge Colgan, as he then was, noted that particular caution should be exercised where the practical effect of a decision to grant an interim injunction might be to put an end to the substantive proceedings.¹⁷

[73] The first jurisdictional issue raised by the respondents relates to s 161 of the Act, which defines the Authority's jurisdiction. Mr Bisley submitted that the Authority had in substance resolved a disputed question as to ownership of property. He said that this is an issue between NZTG and Mint, WASP, Taylor Communications and NAN. It was a question that could only be resolved in a court of general jurisdiction, here the High Court having regard to the value of the property involved.

[74] In response, Mr Hammond argued that the IEAs and the sale and purchase agreements were separate and distinct from each other. He said the parties to each were different. Moreover, the IEAs contained no cross-reference to the agreements

¹⁴ *NZ Tax Refunds Ltd v Brooks Homes Ltd*, above n 9.

¹⁵ At [13].

¹⁶ *Clode v Oliphant* [2018] NZHC 1442 at [18]–[23]; *Wilfred v Gan* [2013] NZCA 457 at [21]; *NWL Ltd v Woods* [1979] 3 All ER 614 at 626.

¹⁷ *Korbond Industries Ltd v Jenkins* [1992] 1 ERNZ 1141 at 1162.

for sale and purchase. They could accordingly be enforced in the employment jurisdiction possessed by the Authority, under ss 161 and 162 of the Act.

[75] These submissions lead to a further point which is contentious between the parties. The respondents say that there is a distinct linkage between the two sets of agreements, for a range of reasons:

- a) Each agreement for sale and purchase was signed by a relevant business owner and NZTG. That person and NZTG was required under each agreement to also enter into an employment agreement. Each signed an IEA at the time the agreement for sale and purchase was signed.
- b) The employment agreements referred to obligations to return NZTG's property, and its confidential information; that is only a live issue if the property had in fact been transferred to NZTG through the commercial agreements.
- c) In the case of Mint, unwinding was contemplated in the commercial arrangements; it must be an implied term of that unwinding that the employment agreement, would in such an event, also come to an end.
- d) The real nature of the relationship between each of the first three respondents and NZTG was that their employment status was clearly linked to the proper implementing of the agreements for sale and purchase; for example, the first, second and third respondents were described as partners who were consulted in the context of the business working together.
- e) If the respondents were to succeed in their argument that the commercial agreements were never completed, there could be no property to return under the IEAs, or confidential information to protect. Orders to that effect are potentially available under s 43 of the Contract and Commercial Law Act 2017 (CCLA).

- f) In the case of those respondents who were subject to a restraint of trade provision, there would be an entitlement to relief under s 83 of the CCLA on the basis the restraint was unreasonable in the commercial circumstances.

[76] In *Credit Consultants Debt Services v Wilson*, a full Court considered the Authority's ability to order interim injunctions with regard to specified obligations, including restraints of trade, as well as confidentiality and non-solicitation covenants. It referred to the provisions of s 162 of the Act, which states the Authority may make any order that the High Court or District Court may make under any enactment or rule of law relating to contracts.¹⁸ The Court said that the section thereby empowered the Authority to grant injunctions both under the rules of law relating to contracts and under enactments.

[77] Accordingly, the Authority had jurisdiction to consider whether to order an injunction under those rules. The Act does not restrict the Authority from assessing any factor which may arise under the rules of contract, or other enactments. The real question is whether it did so correctly?

[78] Turning to the contractual position in this case, the IEAs were signed because the parties to the agreements for sale and purchase agreed this would occur. They were an aspect of the commercial arrangements.

[79] In the event the various business entities had claims justifying cancellation of the agreements for sale and purchase, or for any other relief affecting the continuation of the agreements for sale and purchase, a range of contractual questions about the IEAs plainly arose.

[80] Applying orthodox principles of contract interpretation which require a consideration of background, should the parties be regarded as having intended that the specific covenants would or would not remain in effect in such circumstances? Assessing the language used in context, what was the intended scope and application

¹⁸ *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205, at [47].

of these covenants? In the circumstances, is necessary modification of terms required, at least for Mr Flashoff's IEA, if not for all of the IEAs? Is it reasonable for the restraint of trade provisions to apply in the circumstances?

[81] The Authority proceeded incorrectly by not considering these issues. The omission to considering the commercial context led it to put the issues about ownership of disputed property to one side, to assume that NZTG was entitled to all such property and confidential information, and to infer that the effect of the respondents' case was that the IEAs were some form of device.

[82] In short, the Authority erred in its evaluation as to whether there was a serious question to be tried. The Court must therefore make its own assessment of this factor.

[83] A restatement of the commercial issues is necessary. Despite the lapse of time from the signing of the agreements, the shareholders agreement had not been finalised and signed, even though it had been described in 2017 as 99% completed. No shares had been transferred – even those which had been precisely nominated for transfer at the contracted dates of possession and settlement in 2017.

[84] Some property and databases, but not all, were assigned to NZTG. Some were left in separate systems. The respondents and NAN say that in the circumstances all that happened was the acquisition of “back office” systems. There is also an issue as to the manner in which NZTG acquired client lists. It is alleged they were obtained without the customers knowledge or consent.

[85] Finally, issues are raised as to the finances of NZTG, and whether it managed the business operations adequately in those circumstances, and/or was financially sound.

[86] These allegations are all resisted strongly by the company. In particular, Mr Smith asserts that with regard to each entity, including NAN, NZTG owns the relevant property, including customer lists and their passwords. He also says that it is artificial to state that given the long period of the amalgamated operations, NZTG was simply

providing back room services. It worked assiduously to finalise the outstanding issues so as to complete the various contractual arrangements.

[87] From a consideration of these factors, I find there are significant legal issues, a number of which will have to be resolved in another jurisdiction. It is plainly arguable that these issues are relevant to the scope and application of the IEA obligations, as is alleged for the respondents. In my view, the issues raised by them are also more than frivolous or vexatious. I do not accept Mr Hammond's submission the respondents' claims are weakly arguable. They are at least as arguable as NZTG's claims.

[88] I turn next to balance of convenience factors. The error just referred to as to the significance of the dispute over ownership of relevant assets permeated the Authority's consideration of this factor.

[89] The Authority again proceeded on the basis that the issue of ownership was not a matter for it. It considered whether damages would be an adequate alternative remedy by assuming that NZTG was in fact the legal owner of the assets.

[90] It adopted a somewhat contradictory approach because having concluded the issue of ownership was not for the Authority, it assumed NZTG was in fact the legal owner of the business assets.

[91] Recognition that there was a live issue as to ownership which would have to be resolved elsewhere would have required the Authority to acknowledge that either party may prove to be owner of the disputed assets.

[92] Given that error, it is necessary for the Court to reach its own conclusion on this factor.

[93] There are several issues which are relevant to the assessment of whether damages could be an alternate remedy. The first is to acknowledge that what NZTG was in effect seeking, via the mechanism of the specific covenants in the IEAs, was a return of the business operations, with or without the former employees.

[94] I accept Mr Bisley's submission that even were NZTG to succeed in its substantive claim that the respondents had unlawfully solicited the applicant's employees, its position would not necessarily be protected in the meantime. There could be no guarantee that the ex-employees would return to operate the substantial infrastructure involved. Solicitation of employees is a separate issue.

[95] The Court must also take into account the interests of the numerous customers of the business operations. There are already indications in the evidence that some have walked away from both parties, because they do not wish to be involved in a dispute which shows every sign of being protracted. Others are refusing to engage until the current orders are lifted.

[96] There is also evidence that NZGT have engaged with some customers, no doubt because it believes its entitled to do so, having regard to the interim order. The injunction appears to have contributed to a potentially dysfunctional situation. This confusion would likely be resolved if the order were to be set aside, because there would be clarity as to who would operate the businesses in the interim period.

[97] Returning to the issue of the adequacy of damages as an alternate remedy, the Court must first consider what the position would be if the respondents continued to operate the businesses, via Engage. In that event, NZTG's damages would be capable of enforcement, having regard to the evidence that Engage is in possession of substantial assets which will be utilised for the various business operations.

[98] The position as to damages for the respondents, if they were required to surrender the assets of the various businesses even although disputed, would be problematic.

[99] First, the businesses may not be successfully maintained, because experienced employees, and customers, may not follow the disputed property were it to be returned.

[100] Second, the respondents raised an issue as to NZTG's ability to pay damages, if the business assets were returned. Two hundred thousand dollars was accordingly placed in the trust account of its lawyers, subject to an undertaking that the fund be

applied to meet any damages awarded in favour of the respondents. They estimate they are losing \$75,000 per month in terms of actual and lost opportunity costs. If an interim order were to remain in place until 2022, the \$200,000 fund would be insufficient to meet such losses.

[101] Third, NZTG's ability to meet any damages award needs to be considered alongside other evidence. It is to be inferred from Mr Smith's evidence that shareholders had to contribute to the fund paid into the lawyers' trust account. Moreover, even when trading, NZTG had cashflow issues. It appears the company had only \$104,000 in its account as at 7 September 2020. Outstanding holiday pay at that date was \$106,651. And on other evidence before the Court, NZTG's financial position is weak.

[102] In light of all these factors, the Court cannot be confident that NZTG could satisfy any damages if the Court were to ultimately order it to do so.

[103] In summary, damages could provide alternative relief for NZTG if the injunction is lifted; but not for the respondents if it is not.

[104] I turn next to the point raised for the respondents that there has been a distinct lack of clarity as to what assets are in fact to be returned under the order which the Authority made, as is evident from the attempts made by the respondents to return assets to which they believe the Authority's order properly relates. NZTG does not accept there has been adequate compliance; but the two lists of assets then produced by Mr Smith differ.

[105] Agreement as to precisely what assets might be the subject of an order is also problematic. As mentioned, the parties were given a limited opportunity following the hearing last week to agree terms of undertakings which the respondents might have been prepared to provide to NZTG in order to address the difficult issues that have arisen. Such undertakings would have required clarity as to what assets would be ring-fenced in the meantime. However, the terms of any such undertaking could not be agreed.

[106] Nor is this an issue for the Court to resolve. NZTG did not provide a modified order for the consideration of the Court. As noted by former Chief Judge Goddard in *Nedax Systems Ltd v Waterford Security Ltd*, it is not the Court's task to endeavour to redraft a lengthy and wide-ranging application for injunction.¹⁹

[107] It is well established that the language of an injunction must be sufficiently clear for respondents to know what they have to do, given that a breach of such an order might lead to a term of imprisonment.²⁰

[108] The inability to obtain clarity on this issue is a yet further reason which points to the balance of convenience lying with the respondents.

[109] Finally, there is the issue relating to the potential longevity of any interim order, as already alluded to. To make an order requiring disputed property to be returned, and/or to attempt to protect confidential information for a long period is not practical or fair. Generally, interim injunctions are made to preserve a status quo for a relatively short period until the hearing. That would not be the case here.

[110] It is unclear whether the Authority was required to consider any of these factors. In my view, on the Court's independent assessment they point strongly to the balance of convenience lying with the respondents.

[111] Finally, I refer to overall justice. Again, the Authority relied on its assessment of the strength of the case advanced by NZTG, if one were to focus only on the IEAs. For the same reasons as before, this was an incorrect approach.

[112] Although I agree the order made by the Authority contained some mandatory elements, I do not regard that factor as being dispositive. This is because, on present indications, litigation between the parties will continue whether or not an interim order is made.

¹⁹ *Nedax Systems Ltd v Waterford Security Ltd* [1994] 1 ERNZ 491 at 508.

²⁰ *G J Lawrence Dental Ltd v Alusi Ltd* [2018] NZHC 533 at [55] citing *Answide Home Improvements Pty Ltd v IFO Pty Ltd* [2004] NSW 201 at [4].

[113] I am satisfied the Authority erred in granting the interim injunction. Accordingly, in my judgment of 7 December 2020, the challenge was allowed and the Authority's determination was set aside.

Second issue: application for discharge of freezing order

[114] By way of background, the freezing order was issued on an ex parte basis. NZTG's case was put on the basis the respondents had acted peremptorily; that their likely defence was weak as had been confirmed by the Authority, and that concerns expressed to the Authority subsequently related to the terms in which the injunction had been expressed.

[115] I turn to the legal position. The parties agreed that the relevant criteria for present purposes with regard to the making of a freezing order are:

- a) Whether there is a good arguable case on the substantive claim;
- b) whether there are assets to which the order can apply; and
- c) whether there is a real risk that the respondents would dissipate or dispose of those assets.

[116] In *Shore v Narain*, the Court of Appeal also emphasised the importance of the overall justice of the case, balancing the need to protect the applicant against prejudice or hardship caused to a respondent or to third-parties.²¹

[117] There is no dispute between the parties that NZTG has a good arguable case for relief in the proceedings it has brought by relying on the IEAs. That means there is acceptance that its claim is capable of tenable argument, supported by sufficient evidence.²²

[118] However, I accept Mr Bisley's submission that the strength of the case should not, in the circumstances which are now before the Court, be overstated. The

²¹ *Shore v Narain* [1992] 2 NZLR 544 (CA) at 548.

²² See [29] above.

respondents too have a good arguable case as to the linkage of their IEAs with the underlying commercial arrangements and in particular as to ownership of the dissipated property.

[119] Mr Hammond confirmed he was not arguing that infrastructure assets such as transmitter sites and equipment are at risk of dissipation. He confirmed the company's concern relates to liquid assets, that is funds arising from the business operations of Engage as held in its bank account, and as to wages paid by Engage and the first three respondents.

[120] With respect to the position of Engage, I accept Mr Bisley's submission that the amounts involved may not be significant, given that freezing orders cannot prohibit deductions for normal business and legal expenses paid in good faith. The freezing order in respect of Engage would attach to a modest proportion of its overall assets.

[121] A similar point may be made as to bank accounts operated by the first, second and third respondents, to which their wages may be credited. The freezing order does not prohibit the deduction of reasonable living expenses. Any balance may well be modest. A further fact which should be noted is that in at least one instance a respondent operates a bank account with his wife. The respondents have also provided evidence that the freezing orders have created adverse consequences for the respondents' family members, against whom no claims have been brought.

[122] Next, I consider Mr Smith's assertions that the respondents' actions were "extraordinary" and "duplicious", and that this shows there is a risk of dissipation.

[123] Mr Hammond, in his careful submissions on this topic, reviewed the various steps taken by the parties from mid-2020 onwards. He argued these showed there was unforeseen removal of NZTG's assets; and that Mr Smith was correct in saying he was blindsided by that development. Mr Hammond also argued that the actions of the respondents did not meet any standard of good faith, as required under their various IEAs. It is necessary to review what occurred, to assess this submission.

[124] The business owners were obviously concerned about the unresolved issues by June 2020. In the face of the lack of progress, they gave clear notice of their intention to exit, on 10 July. They said operational issues, and the lack of commitment of the Auckland-based shareholders had become untenable. They proposed a pragmatic process for achieving this. As a result, the meeting which took place on 13 and 14 July 2020 was arranged, although, only two of the five Auckland partners attended it.

[125] By this time, the difficulties between the parties were significant. As summarised earlier, the first, second and third respondents believed NZTG's business and invoicing practices were poor because, for instance, it was unable to pay creditors or incur planned capital expenditure, provide a mission critical afterhours help desk, pay staff salaries or collect debts.

[126] They considered there were serious questions about NZTG'S finances, citing the fact that unusual and unexplained transactions had taken place without their knowledge. They had also concluded NZTG's turnover and profit had been substantially overstated, and that the company did not possess the extent of internet connections or essential tools of trade which had been represented.

[127] Finally, they were concerned that they had not, despite the lapse of time, received the benefits for which they had contracted three years previously.

[128] It appears that an agreement in principle was discussed at the July meeting, although the Court was not advised of the details. Following the meeting, financial information regarding NZTG was provided to a chartered accountant, Mr Nel, who was instructed by the respondents. He reviewed the information with which he was provided by Mr Smith, although he said this was limited. He concluded there had been a number of "unusual transactions".

[129] By August 2020, it appears there were serious differences between the parties as to the financial circumstances of NZTG, and as to the way forward; there was a stalemate, as is evidenced by emails from that period.

[130] This led to the respondents determining that they would exit from NZTG, as had been previously notified.

[131] Mr Hammond submitted the parties were, in the circumstances, contractually bound to attend mediation. I agree. Two points, however, may be made. First, there is no evidence that anyone was aware of the provision in the agreements for sale and purchase to this effect, so it cannot be concluded there was a deliberate bypassing of this obligation. Nor was it likely that such an initiative would have resolved the deep-seated problems. This omission is not evidence of bad faith.

[132] The respondents' letter of 7 September 2020 set out their plans. It was stated, in summary, that only assets and customers brought into the combined operation were being removed. These would be introduced to the new entity, Engage. Other detailed plans, consistent with this position, were outlined.

[133] Given the complexities of the circumstances, now explained by the respondents in considerable detail, I am not persuaded that there was duplicity on their part, such as would justify a conclusion that there is now a real risk of dissipation of the assets. Rather the reverse: the evidence suggests the respondents are committed to maintaining the businesses. Further, the liquid assets are a relatively small portion of the total business assets held by Engage; and the balance of wages held by the individual respondents are unlikely to be significant. All of this points away from the desirability of continuing the freezing orders.

[134] Some weight was placed by Mr Bisley on alleged non-disclosures to the Court at the time the ex parte order was sought. He cited r 32.2(3) of the High Court Rules which requires an applicant for a freezing order to fully and frankly disclose all material facts, including possible defences and any information casting doubt on the applicant's ability to discharge its obligations under the undertaking and damages. Reference was also made to this Court's Practice Directions which require an applicant for a search or freezing order to give "evidence of the applicant's financial ability to meet an order for damages under the injunction".²³

²³ "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 8.

[135] Counsel's memorandum in support of the ex parte order did record that the first to fourth respondents had advanced a defence in the injunction proceedings before the Authority - that they were entitled to remove the assets due to a contractual dispute between certain companies - and that this had been rejected by the Authority.²⁴ However, it is now apparent that this brief description was insufficient to inform the Court of the complexity of the circumstances and thus the strength of a likely defence.

[136] Mr Hammond also submitted that documents relevant to the respondents' likely defence were amongst the range of materials placed before the Court, when the ex parte application was made. That is so, but regrettably, the relevance of these were not explained by Mr Smith or by counsel for NZTG.

[137] It is also the case that information as to NZTG's ability to support its undertaking as to damages was somewhat inadequate. Indeed, such information as was provided was only filed when the Court raised with counsel whether financial information would be provided. That resulted in a second supporting affidavit from Mr Smith. A profit and loss spreadsheet was tendered, which provided a very basic understanding of the solvency of the company. It was not verified by the company's accountant, which in light of what is now known would have undermined the apparently positive impression given by the spreadsheet. Furthermore, subsequent evidence has been provided which clarifies that there were entries in the document that included a COVID wage subsidy, and that by the time the respondents left NZTG, the company's account balance was rather lower.

[138] These matters were regrettable on an ex parte application.²⁵ However, I do not regard them as being so serious so as to now disqualify NZTG from opposing the application to discharge. The reality is that the proceedings continued on an inter parte basis soon after the order was made. The parties agreed the freezing order would remain in place so as to allow proper preparation of the case – however, inconvenient that may have been.

²⁴ Mr Hammond was not counsel for NZTG for the purposes of the ex parte application.

²⁵ As to the duty to disclose, and the consequences of not doing so, see Andrew Beck (ed) *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [32.2.04(2)]; and the "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 8.

[139] Finally, I consider overall justice. A key consideration here is the potential longevity of a freezing order. Such an order would not only impact on Engage, but also as noted, on the first, second and third respondents who are individuals with family commitments. The potential length of a freezing order if made is an important consideration weighing against its continuation.

[140] Standing back and having regard to all the material that has now been placed before the Court, I concluded that it is not in the interests of justice for the freezing order to continue. It should be discharged.

Conclusion

[141] For the foregoing reasons, in my judgment of 7 December 2020 the challenge in respect of the interim injunction was allowed, and the Authority's determination ordering it was set aside.

[142] The application for discharge of the freezing order succeeded. The freezing order, most recently made on 1 December 2020, was also allowed to lapse on 7 December 2020.

[143] I reserve costs. I will receive brief memoranda from counsel as to whether these should be resolved at this stage, within seven days.

[144] Finally, I urge the parties to consider mediation with an experienced commercial mediator, a possibility I have already raised with counsel. Common sense would suggest that very serious effort should be devoted to resolving the many issues to which I have referred, having regard to likely costs which will otherwise be incurred as well as other adverse consequences of prolonged litigation.

B A Corkill
Judge

Judgment signed at 1.10 pm on 9 December 2020