IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 133
EMPC 288/2023

IN THE MATTER OF	an application for search order
BETWEEN	CHAIN & RIGGING SUPPLIES LIMITED Applicant
AND	JUSTIN DOUGLAS WERAHOKO NIKORIMA First Respondent
AND	RAPIDO SAFETY SOLUTIONS LIMITED Second Respondent

Hearing: On the papers

Appearances: P Amaranathan, counsel for applicant

Judgment: 22 August 2023

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Chain & Rigging Supplies Ltd (C&R) has applied urgently and without notice for search orders against Mr Justin Nikorima, a former employee of C&R, and Rapido Safety Solutions Ltd (Rapido), a company incorporated by Mr Nikorima and two others.

[2] The orders sought relate to a search of the premises of Rapido, and its vehicles, which are thought to hold electronic and/or hard copy information copied or taken from C&R; goods belonging to C&R; and evidence of activities which allegedly breach the obligations Mr Nikorima owed to C&R as an employee.

[3] The application is supported by two comprehensive affidavits; a proposed statement of problem; undertakings from C&R; memoranda from counsel, Ms Amaranathan; as well as a draft order. I held two telephone directions conferences with counsel so as to check the proposed terms of the order, and to deal with two topics which became the subject of a supplementary memorandum from counsel. I will refer to these issues later.

Background

[4] C&R is a business of long standing, purchased by its current owners in June 2021. It provides inspection and testing services for lifting equipment and distributes a range of specialist lifting equipment.

[5] Mr Nikorima was employed by the company until 1 March 2023 as Business Development Manager. He had worked for the company before the present shareholders acquired it in 2021. C&R says he had strong relationships with its customers, as well as knowledge of and access to its confidential information.

[6] In September 2022, C&R discovered that Mr Nikorima had emailed customer sales lists from his work email address to his personal email address in August 2022. The spreadsheet contained total sales for each of C&R's customers, cost price and gross profit amounts. It was also discovered that a vehicle consultant had emailed Mr Nikorima a van brochure on 13 September 2022. On 20 September 2022, he contacted the company that fits out C&R's technicians' vans, and asked for fit-out drawings. He also asked how long it would take to instal the layout in a new van with a few minor changes. C&R says this was not part of his employment with the company since it was not purchasing a van and there was no reason for him to make these inquiries.

[7] C&R also became aware that another of its employees had been approached by Mr Nikorima, who informed him he would be going into business with two investors and asked him to attend a meeting about it. There is no evidence that the person, now a former employee, attended such a meeting. I will refer to this person later as "the former employee". As he is not a party to this proceeding, I will not name him for natural justice reasons.

[8] These issues were discussed with Mr Nikorima who said that none of them related to the possible setting up of a business. He gave an assurance to that effect. Because he appeared visibly upset during this conversation, his explanation was accepted.

[9] In October 2022, Mr Nikorima, together with two others, incorporated Rapido. C&R was unaware of this step at the time. He did not declare a potential conflict of interest to C&R, which would have been necessary under his individual employment agreement (IEA) had that been the case.

[10] On 20 February 2023, Mr Nikorima resigned from C&R, giving a period of four weeks' notice. Initially he would not come into work; it was understood this was for personal reasons. Mr Lance Davis, a director of C&R, says he wished to have a discussion with Mr Nikorima about customer handover, his contacts and company cell phone, as well as other company information, but it was some time before Mr Nikorima came into the workplace for this purpose.

[11] An exit meeting was ultimately held on 1 March 2023. It was apparent by that stage Mr Nikorima would not work out his notice period. Mr Davis says a customer handover would normally be carried out by an exiting employee during the notice period. Since Mr Nikorima did not attend work on a regular basis during the notice period, this was not possible.

[12] Mr Nikorima undertook a factory reset of his company laptop and smartphone before handing in these devices. All company information stored on those devices was thereby deleted.

[13] Prior to the exit interview, Ms Jaqueline Edwards, Division Manager, undertook a Companies Office search and learned Mr Nikorima had incorporated Rapido not long after he had said he would not be competing with C&R in September 2022. He is a shareholder of the company with two others, as had been indicated to the former employee in September 2022 would be the case.

[14] At the exit interview, Mr Nikorima was asked about the incorporation of Rapido. He said that the company had nothing to do with the type of business operated by C&R, and that it was for bringing in traffic equipment such as temporary lights. He said he had not mentioned the existence of the company previously because it did not relate to C&R's work. He also said that his relationship with the former employee had soured over the previous few months.

[15] Two days after Mr Nikorima's resignation, the former employee raised concerns about C&R's systems, management and how its products were being tested.

[16] At about this time, evidence had become available showing that the former employee had contacts with Mr Nikorima of a kind which suggested that his relationship with the former employee had not soured. From GPS records, it could be seen that on 10 February 2023, the former employee had visited premises which are now occupied by Rapido, and that on the day of Mr Nikorima's exit interview, the former employee had driven him home, remaining at Mr Nikorima's residence for about an hour.

[17] When asked about these matters on 16 March 2023, the former employee provided various explanations, and Mr Davis became concerned as to whether the former employee was being candid with him.

[18] Also, by 16 March 2023, C&R had become concerned as to whether there had been material breaches of Mr Nikorima's IEA. Lawyers acting for the company wrote a 'cease and desist' letter about its matters of concern. An advocate replied on 27 March 2023, effectively asserting that the various concerns were misconceived. In particular, an assurance was given that Mr Nikorima would not breach his obligations to the company and would not solicit its customers. In reliance on these representations, the company took no further steps at that stage.

[19] In late July 2023, C&R became aware that Mr Nikorima, on behalf of Rapido, had sold products, marked "Chain & Rigging" or embossed with the company's batch numbers, to one of its customers in two consignments. Ms Edwards is certain C&R had originally purchased some of those items. She considers there is no legitimate

way Rapido could have acquired these products, and that they belong to C&R. From this, the conclusion has been drawn that Mr Nikorima was in possession of, and selling through Rapido, the applicant's products.

[20] In late July 2023 and since, C&R says it has received copies of emails showing Mr Nikorima has, on behalf of Rapido, been soliciting six and dealing with seven customers he had previously dealt with in the last 12 months of his employment with C&R. From these and other emails, Ms Edwards and Mr Davis have concluded Rapido copied C&R's "new account application form" and product codes. It also offered customers precisely the "same pricing" as that which had been adopted by C&R including, in one case, a similar discount. Ms Edwards is concerned that Mr Nikorima has probably copied other C&R information as well.

[21] On 27 July 2023, a private investigator carried out covert surveillance of the former employee who was driving the same brand of van as that which he had driven for C&R, endorsed with a Rapido logo. He visited two customers with whom he and Mr Nikorima had dealings in the final 12 months of Mr Nikorima's employment with C&R. He also drove to C&R's supplier of product. Ms Edwards says Mr Nikorima would have had dealings with the supplier in the final 12 months of his employment with C&R.

[22] Ms Edwards also says two of its former customers now having or suspected to be having dealings with Rapido were significant customers. She says Mr Nikorima was able to take these steps because, as C&R's Business Development Manager, he had formed good relationships with these and other customers, which he has capitalised on. Mr Davis considers there has been a significant decline in sales for the period April to July 2023, details of which he provided to the Court.

[23] C&R has recently instructed an IT expert to attempt to recover information from the laptop and smartphone assigned to Mr Nikorima during his employment with it, but no information was able to be recovered.

[24] Although C&R contends the former employee has been, and is, directly involved in the activities complained of, Ms Amaranathan confirmed the company does not intend to bring a claim against him, given a mediated settlement.

Proposed proceeding

[25] C&R has drawn the conclusion that various obligations in Mr Nikorima's IEA have been breached, both those which applied up to the date when his employment ended, and those which have applied since. It also believes that Rapido is aiding and abetting Mr Nikorima in those breaches, and has assisted him to mislead and deceive C&R. It intends to file a statement of problem in the Employment Relations Authority as soon as the search order has been executed, seeking a range of remedies under the Employment Relations Act 2000 (the Act) and the Fair Trading Act 1986.

[26] C&R believes that both respondents have property (information and goods) belonging to it and other evidentiary material relevant to the intended Authority proceeding. Thus, it considers a search order is necessary to secure and/or preserve evidence for that proceeding.

[27] It says a number of false and/or misleading assurances have been given. Further, it believes that given the history referred to earlier, were notice of an application for a search order to be given to Mr Nikorima, it is likely goods and/or information would be concealed.

Legal framework

[28] The principles applicable to an urgent without notice application for a search order are well established. The Court has jurisdiction to make search orders under s 190(3) of the Act, and by applying pt 33 of the High Court Rules 2016. Item eight of the Court's Practice Directions confirms the necessary prerequisites for the granting of a search order.[1]

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[1] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 8.

[29] A search order is a draconian tool because it is one which is generally made without notice, with potentially significant consequences. Moreover, a breach of a search order may amount to contempt.

[30] Consequently, pt 33 of the High Court Rules requires compliance with a broad range of provisions, including as to the making of an order only in particular circumstances. Comprehensive undertakings as to implementation must be given by the applicant, including as to damages. An independent solicitor must supervise the execution of the order. A mandatory review is to be undertaken by the Court after the order has been executed. By these means, the Court maintains oversight of the process. At the commencement of the process, particular care must be taken to ensure an applicant has complied with and can satisfy all necessary requirements.

[31] An applicant for such an order must establish a strong prima facie case on an accrued cause of action; that potential or actual loss or damage to the applicant would be serious if a search order was not made; and that there is sufficient evidence in relation to a respondent to show that the respondent possesses relevant evidentiary material, and that there is a real possibility that the respondent might destroy such material, or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding.[2]

[32] I now deal with each of those requirements.

Strong prima facie case

[33] It is asserted that there has been a breach of the following provisions of Mr Nikorima's IEA:

(a) A confidentiality clause;

(b) post-employment obligations which include a three-month non-competition restraint of trade, a six-month non-dealing restraint of

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[2] High Court Rules 2016, r 33.3.

trade relating to customers and suppliers, and a six-month non-solicitation restraint relating to employees, contractors and consultants;

(c) a conflicts of interest clause; and

(d) a comprehensive return of property clause which required Mr Nikorima to return anything belonging to the company when his employment ended, and to co-operate with it to ensure it could continue to access and operate all company information technology after his employment ended.

[34] C&R alleges that Mr Nikorima, as a trusted senior employee, had access to confidential information and formed relationships with customers which would be valuable to a competitor.

[35] I am satisfied that the comprehensive affidavit evidence which has been filed establishes a strong prima facie case that Mr Nikorima has breached his obligations to his employer, both during and after his employment, by breach of his IEA, by breach of his duty of good faith under the Act, and by breach of relevant provisions of the Fair Trading Act.

[36] Further, there is a strong prima facie case that Rapido has incited, instigated, aided or abetted Mr Nikorima's breaches.

Seriousness of potential loss or damage

[37] It is submitted for the company that there would be a potential for serious loss or damage were a search order not to be made.

[38] It is contended that C&R has a well-established and viable business and that Mr Nikorima has extensive knowledge of the company's confidential information. It is also argued that there is sufficient evidence to suggest Mr Nikorima has C&R's property, being goods and information, which he is using for competitive purposes. It is asserted this has the potential to cause serious harm to C&R, the full extent of which C&R may not be able to prove without a search order.

[39] In particular, it is contended that company product, customer lists, template documents, pricing information and testing schedules belonging to C&R are likely possessed by Mr Nikorima and Rapido, which would provide a significant springboard for the new business.

[40] The Court is told that harm to C&R's business could potentially affect its 16 employees, especially in the current economic climate. It is asserted that they are innocent parties. It is also contended that C&R's annual revenue has already been adversely affected, as noted earlier.

[41] Lastly, it is submitted that the search order is necessary to secure or preserve evidence which may be necessary to establishing C&R's causes of action against the respondents, in particular to understand the nature and extent of the alleged breaches.

[42] For prima facie purposes, I accept these submissions, and find that this aspect of the necessary criteria for the making of an order is established.

Evidence of evidentiary material held by the respondents

[43] A clear inference may be drawn from the material placed before the Court that there is further information held by the respondents which would be relevant to the applicant's intended claims.

[44] C&R points to what it says, in effect, is suspicious conduct on Mr Nikorima's behalf. Reliance is placed on the factory reset of his laptop and smartphone which it is submitted invites a conclusion he had something to hide or wanted to deprive C&R of relevant information at the time of his departure. The company also highlights the several statements made by Mr Nikorima before and after his resignation that he would not compete. It says these statements were plainly misleading. Reference is made to emails sent by Mr Nikorima to various customers which were copied, presumably by mistake, to the former employee's email address at C&R, from which it can be inferred Mr Nikorima is likely to be dealing with and/or soliciting customers in breach of his restraint of trade obligations.

[45] I accept, on the basis of the information before the Court and the inferences which are drawn, that there is sufficient evidence that the respondents have in their possession further evidentiary material relevant to C&R's intended claim.

Possibility of evidence being destroyed/unavailable

[46] It is submitted there is a real risk information may not survive or be disclosed in the absence of an order because Mr Nikorima has destroyed company information and repeatedly given false or misleading assurances to C&R about his intentions. On the basis of the evidence placed before the Court, numerous attempts to deceive C&R were made. I accordingly accept C&R's submission.

Overall justice

[47] In his supporting affidavit, Mr Davis has set out possible defences which may exist. It may be possible to raise denials about some aspects of C&R's claims. It may be possible to assert that the IEA restraints were unreasonable. However, I do not consider these possibilities render it inappropriate to make a search order.

[48] Mr Davis also confirms he has made full and frank disclosure of all relevant material. He has conducted inquiries with an IT expert, a private investigator, and another C&R division manager, Ms Edwards.

[49] The orders sought would not result in any of the respondents' property being destroyed. Although they provide for removal of devices from Rapido's premises, the Court is assured those devices could be returned as soon as they are cloned or relevant information has been copied from them.

[50] The draft order as originally submitted to the Court provided for removal of all goods from Rapido's premises if they were marked "Chain & Rigging" or had the company's batch numbers embossed on them – they called these the "marked goods". Given that the present application is not one for a preservation order under r 7.55 of the High Court Rules, I indicated to counsel that I did not think the outright removal of marked goods could meet a proportionality test, since there were obviously less invasive options. It has long been the case that an order should not be made in

unnecessarily wide terms, and it must seriously be considered whether a less intrusive order is available.[3]

[51] Ms Amaranathan subsequently submitted that there appeared to be no reported cases illustrating the proposed approach where an applicant was seeking orders in relation to goods/property/product, rather than information or electronic devices. She said that in those circumstances, C&R was agreeable to marked goods being photographed (together with unmarked goods) and an inventory being taken of them, rather than effecting removal. This was on the basis that the respondents' information relating to its inventory of stock, sales and purchases should allow identification of the source of goods found on the second respondent's premises and/or sold by the second respondent. The draft order was amended accordingly.

[52] For the avoidance of doubt, were either respondent to dispose of the marked goods, whether by sale or otherwise, between the date of service of the order and the Authority's investigation meeting, and were the applicant to subsequently establish it is entitled to possession of those goods, it is likely the respondents' credibility would be damaged, and consideration would need to be given to enhanced compensation and/or damages.

[53] I acknowledge that search orders are serious and, as just noted, there must be some proportionality between the perceived threat to an applicant, and the consequences to the respondents of such orders being executed.[4] I am satisfied that in this case, the orders in the form which I am now approving are the only reasonable option for securing the information and identification of goods that C&R alleges belong to it. Accordingly pt 33 of the High Court Rules is satisfied, and I make a search order as sought.

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3 See for example *Columbia Picture Industries Inc v Robinson* [1986] 3 WLR 542 (Ch).
4 At 543.

Other considerations

[54] Appropriate undertakings have been given. Financial evidence has been provided which suggests the applicant would be able to pay any order for damages against it, if made.

[55] C&R seeks an order that service copies of the affidavits be redacted on the basis that certain paragraphs of Mr Davis's affidavit and annexures contain commercially sensitive information.[5] An order is sought that this information be redacted from the service copies, subject to a proviso that full copies be given to the respondents' lawyer upon a suitable undertaking being given, or their advocate upon a suitable assurance being provided, including to the Court. I approve these steps. It may be that the respondents accept the proposal that unredacted copies be provided to their representative(s), but if not, that is a matter they can bring before the Court in due course.

[56] A copy of this judgment, the draft statement of problem, the affidavits (but with the redactions proposed), the application for an order, counsel's memoranda and undertakings are to be served on each respondent, along with the search orders, before they are executed.

[57] The statement of problem is then to be finalised and filed with the Authority as soon as possible thereafter.

[58] This judgment is not to be published other than to the parties, their representatives, and to the authorised persons who are to execute the search order, until further direction from the Court. I make an order that the Court file is not to be searched without leave of a Judge. If anyone seeks access to it, the parties are to be given notice of that application so they can be heard before it is dealt with.

[59] The applicant's intention is to execute the search orders on a business working day on or before 25 August 2023. On that basis, at 10 am on 4 September 2023, the Court at Auckland will consider the report from the independent solicitor, which is to

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5 As described at para 85 of his affidavit.

be filed and served by 4 pm on 1 September 2023. Memoranda seeking directions from any party intending to appear at the review hearing are to be filed and served by the same time and date. At the date of review, the applicant, the respondents and the independent solicitor will be heard.

[60] In the meantime, leave is reserved for any party to apply to the Court on 24 hours' notice to vary or discharge the orders made in this judgment.

[61] Costs are reserved.

B A Corkill
Judge

Judgment signed at 1.10 pm on 22 August 2023