

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 67/08
File Number: 5121520

BETWEEN 24 CARROT LIMITED
Applicant

AND ZHEN YE-QING and
CAPITAL PRODUCE
LIMITED
Respondents

Member of Authority: P R Stapp

Representatives: David Burton and Rachel Burt for the Applicant
Alan Knowsley and Jenny Graham for the Respondents

Investigation Meeting: 29 April 2008 at Wellington

Submissions 9 and 14 May 2008

Determination: 19 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant has alleged that Mr Zhen Ye-Qing and Capital Produce Limited (CPL) have unlawfully obtained information that is confidential to 24 Carrot Limited (24) and that Mr Ye-Qing has breached restrictive covenants and confidentiality covenants contained in an individual employment agreement between the parties. It is alleged that the respondents have breached orders of the Authority made on 19 April 2008. It is alleged that the respondents' conduct is causing the applicant potential losses in revenue and profit. The applicant is seeking damages.

[2] Mr Ye-Qing was employed by 24 until 18 March 2008. CPL was set up as a competitive company on 27 February 2008. Mr Ye-Qing and Mr Alastair Lang are directors of that company, both of whom were shareholders at that time. It is alleged Mr Ye-Qing has been directly contacting

the applicant's clients and using the applicant's confidential pricing strategies and customer lists to entice those clients, aided and abetted by Capital Produce Limited.

[3] Further, the applicant claims that Mr Lang is working behind Stone International Limited, a company he owns, for avoidance. The applicant has requested the Authority to lift the corporate veil as Stone International Limited is being used by Mr Lang as a sham or a device to avoid the Authority's orders. The applicant has requested Stone International be joined to the proceedings and bind it to the Authority's orders for compliance.

[4] The Respondents have denied the allegations and provided their explanations on the matters raised by the Applicant. In addition Mr Ye-Qing denied signing a draft employment agreement that he accepted he received. The respondents have denied breaching the Authority's orders made on 19 April 2008 and have rejected the claims for damages.

The Facts

[5] 24 is a fresh fruit and vegetable supply delivery business. The company operates within the greater Wellington area. Mr Ye-Qing was employed by 24 from 11 September 2006 until 18 March 2008 as the company's operation manager. He worked on and developed a price spread sheet for 24 during his employment.

[6] Since CPL was formed and registered as a company on 27 February 2008 Mr Ye-Qing has sold his ownership stake in the company and is now employed by it.

[7] Mr William Hansen, managing director of 24, has alleged that he and Mr Ye-Qing signed an individual employment agreement, and he has found a copy of the agreement, which he has produced and says, was signed by Zhen Ye-Qing. Mr Ye-Qing denied that it was his signature on the document.

[8] Mr Hansen says that the individual employment agreement was dated 7 September 2006 and was signed by Mr Ye-Qing and the original kept on a personnel file at 24's premises. He says he discovered that the agreement and file relating to Mr Ye-Qing's personnel details appeared to have been removed from the company's locked office after Mr Ye-Qing had left. It is not known where it is now. He says that he and the office manager and Mr Ye-Qing were the only persons to have keys to the office. He suspects Mr Ye-Qing has taken it. Mr Hansen says that he knows that Mr Ye-Qing signed the company's standard employment agreement because he directly recalled signing the agreement himself and discussing it with Mr Ye-Qing. He says that his office manager, Roberta Bennett, also checked the signed employment agreement and entered the salary details into

the company system for remuneration purposes. She has provided an affidavit supporting him, but was not available for me to question.

[9] The individual employment agreement produced makes provision for the following:

Clause 15.7 [Employee Obligations]

...The employee must declare any interest in any business of any kind for which the employee may potentially be in conflict or in competition with the business of the employer. Further the employee may not, whilst in the employ of the employer, invest personal money, obtain an interest in or establish any other business that may be deemed to be in competition with the employer or its principals without the written permission of the employer.

Clause 29 Confidential Information

29.1 *The Employee undertakes not to disclose to any person, or make use of, any information or material regarding personal details of any other employee that has been obtained during the course of their employment with the Employer.*

29.2 *The Employee shall not remove or copy any confidential, or commercially sensitive and commercially valuable information, including client/customer information, from the Employer's premises without the prior written consent of the Employer.*

29.3 *The restrictions contained in clauses 29.1 and 29.2 do not apply to;*
 29.3.1 *the use or disclosure of such information in the normal course of the Employee's duties; and*
 29.3.2 *information which has already become public knowledge other than as a result of a breach of this clause by the Employee*

29.4 *The restrictions contained in the first two clauses under this heading apply both during the term of this agreement and after the expiry of the agreement.*

29.5 *The Employee shall not at any time or for any reason, whether during the term of this agreement or after its termination, use or disclose to any person any confidential information relating to information, or trade secrets of the Employer except so far as may be reasonably necessary to enable the Employee to fulfil their obligations under this agreement.*

29.6 *The Employee shall not disclose any confidential information who is not authorised to receive it.*

29.7 *The Employee shall not use any confidential information relating to the Employer's business, or information gained through the employment, to their own benefit, as distinct from the benefit of the Employer*

29.8 *The Employee shall not use or attempt to use any confidential information in any manner, which may injure or cause loss whether directly or indirectly to the Employer*

29.9 *During the course of employment or after termination of employment with the Employer, the Employee shall not directly or indirectly make a record of or divulge, or communicate to any other person, any information regarding the Employer's business, or any matters associated with the Employer. When*

requested, the Employee hereby agrees to sign a Statutory Declaration stating they are collecting commercially sensitive and valuable information only to perform the tasks required by the Employer and that the commercially sensitive and valuable information will not be passed to others during and after the term of employment. The Employee also irrevocably agrees to sign a Statutory Declaration stating they have returned all copies, in any and every form, of all commercially sensitive and valuable information on the termination of employment with the Employer.

Clause 40 – Non-solicitation

The employee shall not at any time during the period of employment or for a period of one year after termination of employment, for whatever reason, either on the Employee's own account or for any other person, firm, organisation or company, solicit, endeavour to entice away from or discourage from being employed by the Employer, and any other Employee or actual client/customer or protective client/customer of the Employer.

Clause 41 – Restraint of Trade

The Employee shall not at any time during the term of this agreement and for a period of twelve (12) months after the termination of employment with the Employer establish, purchase, or obtain an interest in, either directly or indirectly any business in relation to anyway to the Employer within a radius of twenty (20) kilometres, without the express written consent of the Employer, provided that such consent shall not be unreasonably withheld.

SCHEDULE 3

Employment Agreement Schedule – Covenant of Employee

I, Zhen Ye-Qing covenant with 24 Carrot Limited in consideration of the agreement by 24 Carrot Limited to enter into a contract of employment with me (which contract shall, after execution of this covenant, be concluded), that I shall not during my employment by 24 Carrot Limited or thereafter use, divulge or communicate to any person any of the know-how in the business of 24 Carrot Limited, all of which I acknowledge to be confidential information, including without limitation any such information concerning the practice, dealings, transactions or affairs of 24 Carrot Limited which I may acquire pursuant to the performance of my responsibilities as an employee of 24 Carrot Limited.

For the avoidance of doubt I confirm that this covenant is given by me for the benefit of and shall be enforceable by 24 Carrot Limited.

[10] Mr Ye-Qing resigned his employment on 27 February 2008 on notice in writing. His final day of employment with 24 was on 18 March 2008. Mr Hansen says that he was told by Mr Ye-Qing that he was resigning because he was going to China to get married. This was not true. While Mr Ye-Qing admits to saying this, he did so because he did not want other 24 employees asking him for work. Mr Ye-Qing's resignation read as follows:

It is with great regret that I wish to advise you of the termination of my employment from the 18th of March being my final day of work. This has not been an easy decision for me but I have reached the point in life where I must go out and try new business opportunities with my full commitment.

I'd like to take this opportunity to thank you for the employment and friendship you have given and shown me over the last 18 months.

All that I ask for from you is your blessing in this new venture, as it is something I am passionate about and have wanted to do for a long time.

*Kind regards,
Zhen Ye-Qing*

[11] On 10 April, Mr Hansen became aware that Mr Ye-Qing had set up a directly competitive fruit and vegetable company and delivery company in Wellington on 27 February 2008. He discovered that this company was incorporated as CPL with Messrs Ye-Qing and Lang as its directors and shareholders.

[12] Mr Hansen says that on 10 April 2008, at approximately 8am, AF Transport (AFT) delivered produce to the premises of 24. Mr Hansen says it was discovered that some of the delivery did not belong to 24. Mr Hansen says he rang the supplier and established that the produce was for CPL. At that point he had no idea who CPL was, but also discovered that the produce had been ordered by Mr Ye-Qing from AFT.

[13] Mr Hansen says he discovered that a Toshiba satellite notebook computer owned by 24 was missing. He says this computer was stored overnight in a cupboard behind the receptionist's desk at 24's premises. He says that the only people with access to the office would be the administration staff, himself and Mr Ye-Qing. He says the notebook was bought around 28 January 2008 for Mr Ye-Qing's use as the operations manager. He says it contains the company's entire customer and supplier information and all the details of the company's pricing strategies and business development plans. Upon discovering it was missing the Police were notified that it had been stolen.

[14] Mr Hansen says that he received calls from a person from Café L'affaire and another person at Leuven Restaurant that they had been approached with a supply price list by Alastair Lang who wanted to do business with them and provide all their fresh produce. Mr Hansen says that Parade Café ceased business with 24 and entered into an agreement with another supplier, Mr Alastair Lang. There was no corroborating evidence from the two former customers.

[15] Mr Hansen says that he has also made contact with another supplier based in Palmerston North and spoke to one of its directors, who confirmed that Mr Ye-Qing had been in contact with that person recently about a new venture. There was no evidence produced from that person.

[16] Mr Hansen says that he spoke with a person he named at a business called Kensington Gardens, a supplier, and was told that that business had been approached by CPL. Mr Hansen says this is significant because Kensington Gardens provide produce to 24 that historically had only been

available to customers and clients through 24. He relies on this supporting his contention that the company's database of suppliers and customers and confidential pricing strategies and business development plans were being used by Mr Ye-Qing and CPL to directly compete against 24. No evidence was produced from this supplier.

[17] Mr Hansen says another business that has been contacted by Mr Ye-Qing is Epicurean Supplies in Hastings for an order. Specifically, he alleges that a person at that business was requested by Mr Ye-Qing not to tell anybody where he was working. There was no evidence produced from this supplier.

[18] Mr Hansen also says that on 10 and 11 April, while he was working, he happened to go into the street and saw a car turn into Torrens Terrace where the applicant's premises are located. As it shone its lights on him it quickly reversed away and drove down Webb Street. He says that vehicle was a Subaru five-door wagon and resembled a car that Mr Ye-Qing used to drive to work and which he borrowed from his brother. Mr Ye-Qing denied this claim. Also Mr Hansen says that he has a video showing Mr Ye-Qing returning to his business. I find that a disc produced of the video footage did not show for certain that the person was Mr Ye-Qing.

[19] Mr Hansen says that on 11 April Leuven Restaurant confirmed by telephone that Mr Ye-Qing had been the person who had delivered the proposed price list in an effort to gain their business. Mr Hansen says that the office assistant received this confirmation. There was no evidence produced from the restaurant and "24's" office assistant.

[20] Mr Hansen says that on 11 April 2008 he discovered, by accessing Mr Ye-Qing's public *Trade Me* information, that Mr Ye-Qing had recently purchased a new Toshiba satellite notebook battery charger/power adaptor. He says that the power adaptor for the notebook had been left behind when the notebook had been removed. Mr Ye-Qing allegedly retained the modem and router for the notebook when he resigned.

[21] Messrs Ye-Qing and Lang denied Mr Hansen's allegations. They say that the computer being referred to belongs to CPL. There was no evidence produced to contradict this.

[22] They denied approaching the chef at the Backbencher; Diane Schollar, café owner, Parade Café; Jeremy Lang a director of a business called Wild Chef, South Pacific Gourmet Foods; Brian Russell, co-owner of Sea Stores Limited; and Leslie Deng owner of The Village Café. The chef at the Backbencher deposed that he approached Mr Ye-Qing and the others say that they approached Mr Lang on their own initiative. Dianne Schollar says she has never traded with 24 in her capacity as the owner of the Parade Café.

[23] Mr Lang says that he did not know about any employment agreement between 24 and Mr Ye-Qing and did not know that the spread sheet had come from 24.

[24] On 19 April 2008 the following orders were made by the Authority:

“[1] *“The First and Second Respondents are restrained from trading with, soliciting or endeavouring to entice away from the Applicant or any person or organisation who was a client or customer of the Applicant during the time of the First Respondent’s employment with the Applicant or who became a client or customer of the Applicant after the termination of the First Respondent’s employment. This includes the five named businesses that both parties have referred to”.*

[2] *By consent “The Respondents’ are required to return forthwith all documents and electronic data and any computer which belong to the Applicant and are in the possession or under the control of the First and or Second Respondents. This includes all copies of the documentation and data described which shall also be delivered to the Applicant forthwith.”*

[3] *By consent “The Second Respondent is to allow an independent Information Technology expert appointed by the Applicant to check that the Applicant’s information and software was ever on, and if so, has been removed from the First and Second Respondents’ computers and software. The expert will be organised from a reputable firm of forensic experts. It is agreed the expert’s report is to be given to each party and the Authority simultaneously and that the expert will conduct his/her examination without disrupting the Second Respondent’s business. Such arrangements are to be left to the parties’ solicitors to make the necessary arrangements.”*

[25] 24 now says that the first order of the Authority has been breached and has applied for compliance on the basis of a solicitor’s telephone calls to different businesses.

[26] Mr Ye-Qing says he is no longer a director of CPL. He says he has sold his shares in the company and has no ownership interest in CPL. He is now employed by CPL. He had given an undertaking not to solicit any clients of 24 and not to use any confidential information belonging to 24. His agreement to sell his shares and ownership interest for \$1,000 consideration was effective on 24 April 2008.

[27] Also the applicant has produced details that another company, Stone International Limited, is being used by Mr Lang and implicated in the compliance issues.

The Issues

[28] Is the employment agreement produced enforceable, and if so, are the restraint of trade and non-solicitation clauses in the agreement enforceable? In particular was the agreement produced by Mr Hansen signed by Mr Ye-Qing? Has Mr Ye-Qing breached the terms of the agreement and the orders of the Authority made on 19 April 2008? Has Capital Produce Limited aided and abetted any breaches of the terms of the agreement, if it is enforceable, and the orders of the Authority? What should happen with Stone International Limited?

Determination

[29] Mr Hansen has not satisfied me that there is a properly signed agreement. The agreement he has produced that purportedly was signed by Mr Ye-Qing remains unexplained given that Mr Ye-Qing absolutely denied signing it. In other words I am not satisfied that Mr Hansen has proved the agreement was signed by Mr Ye-Qing because:

- The timing when it was produced: there was no deposed evidence from Mr Hansen that he was actually looking for it and that there was some possibility that he would find it in a cupboard. He did not depose any evidence of the likelihood of finding a copy, other than the one he initially produced, at any time before the Authority's investigation meeting. The earlier evidence was that the agreement would have been filed in the employee's personnel file, which apparently has gone missing.
- Roberta Bennett and Helen Bartlett, administration assistant, who deposed evidence, have not given any evidence to support a copy being made and being put in a cupboard for safe keeping and making any attempt to find a copy. They did not depose actually seeing the agreement being signed by Mr Ye-Qing. They might have seen a copy of the signed agreement but their evidence does not confirm that it was signed by Mr Ye-Qing.

- There is a difference in Messrs Hansen's and Ye Qing's evidence that there were only one or two copies of the agreement, and how many Mr Hansen actually signed. Mr Hansen gave three explanations on this.
- The documents are different considering Mr Hansen's signatures and where the dates have been put. The documents are only copies that make close scrutiny of them difficult.
- Mr Hansen gave different explanations of how the unsigned agreement he gave to Mr Ye-Qing could still be in Mr Ye-Qing's possession if he had the signed original returned to him.
- Mr Hansen explained that there were two copies made when initially his evidence was that there was only one copy.
- The purported date of Mr Ye-Qing's signature on 7 September 2006, which is the same date that Mr Hansen signed the agreement, is inconsistent with Mr Hansen's evidence that Mr Ye-Qing returned the agreement a fortnight or so later. Mr Hansen also said that Mr Ye-Qing told him he did not want to sign an agreement. This is consistent with Mr Ye-Qing's evidence that was adamant he did not sign any agreement.
- Only photocopies of the agreements have been produced and both parties have differing views on how much alike or not the signatures are. Neither party arranged for expert evidence to comment on the signatures.
- Mr Ye-Qing has been consistent, clear and was unshaken on his evidence. I accept that Mr Hansen has been equally emphatic but has fallen short of being able to prove his allegations.
- I accept Mr Ye-Qing caused some doubt because of his comments he made about going to China and did not disclose that he was going to work in another venture. He gave reasons for his action, which included that he did not want other 24 employees to know and did not want to employ them if they asked for work. In this regard he had an obligation to act in good faith and be communicative and responsive with his employer. He clearly did not, despite alluding to his future in his resignation letter.

- There are a number of factual differences that have emerged involving allegations made by Mr Hansen that he has not been able to prove including a disputed resignation interview between Mr Hansen and Mr Ye-Qing and the latter allegedly saying that there are “ways around” restraints of trade. I accept that there could be a contextual issue about the conversation given that Mr Hansen has not been able to prove his other allegations.

[30] The next issue is therefore the enforceability of the agreement given that there has been a dispute that it was signed and the signature on the signed agreement produced by Mr Hansen purporting to be Mr Ye-Qing’s, remains unexplained. It is clear in this case that Mr Ye-Qing understood there was an agreement, but says that he had never signed an employment agreement in his life and did not agree with them or that he had any use for them. There is no sign, or evidence of any conduct, that Mr Ye-Qing accepted all the terms of the agreement. There is no independent evidence that could be tested witnessing the agreement being signed. In the circumstances it is not certain that Mr Ye-Qing accepted the terms in particular the restraint and non-solicitation clauses. Thus I conclude that the agreement was incomplete.

[31] However, it was reasonable to expect that Mr Ye-Qing would treat his employer’s information as confidential: (without a signed agreement). Mr Ye-Qing says that he has kept that information confidential.

[32] Since there has been no proof that Mr Ye-Qing took the computer that Mr Hansen suspects was stolen, and there is no proof that Mr Ye-Qing has a hard copy of Mr Hansen’s client and customer lists, I can not establish that Mr Ye-Qing has breached any duty of confidentiality.

[33] In support of my conclusion an analysis of the computers at CPL did not locate any 24 software and documents relevant to any of the allegations that there have been breaches. The computer expert confirmed that nothing had been located, that there was no file maker software and that no confidential information of 24 existed on the computers. The expert told me the computers were made freely available for inspection and that he received full co-operation.

[34] Mr Ye-Qing retained and used a spread sheet he developed and used at 24. The purpose of the spread sheet was to set out prices. The evidence was that prices were different to those of 24. I accept the prices were CPL’s. Mr Lang told me he had no idea that the spreadsheet had come from 24. The use of the spreadsheet was not sufficient to establish that Mr Ye-Qing and Mr Lang were undercutting 24 as Mr Hansen claimed. This is because there were different prices and prices are determined on a day to day basis from the market for fruit, vegetables and other items, and not any

prices based on “24’s” price list. Mr Hansen confirmed that prices change on a day by day basis. I accept the assurance given that the spread sheet is not being used any more. There is no evidence that CPL is using “24’s” pricing information and brand.

[35] The enforcement of the restraint and non solicitation clauses is affected by the agreement that was not signed and not concluded between the parties, that restraint clauses are prima facie invalid and that there is an issue between the parties on the clause’s reasonableness and whether or not it protects a genuine proprietary right of the employer.

[36] The evidence I heard was that Mr Ye-Qing has not approached any of Mr Hansen’s 24 clients and customers. I have to accept the evidence from Mr Ye-Qing and Mr Lang because they were supported by Ms Schollar from the Parade Café, Jeremy Lang from South Pacific Gourmet Foods and Brian Russell from Sea Stores Limited. I am satisfied that the above had various reasons, without supply agreements, to leave 24, and that contact involved Mr Lang-including on a personal basis-and CPL; and not Mr Ye-Qing. Mr Hansen was unable to corroborate his claimed conversations with various people, and elected not to call them to give evidence and be questioned by me. In addition he has relied upon hearsay to support his deposed evidence and statements, which is not sufficient, in my opinion. Three witnesses who Mr Hansen would have liked to provide evidence in person were not available. Thus they were not able to be interviewed on their written statements.

[37] It follows that in the absence of any breach there can be no aiding and abetting. This is supported by Mr Lang saying he did not have any knowledge of an employment agreement existing between 24 and Mr Lang and did not know that the spread sheet format came from 24.

[38] Further I accept that Mr Lang has operated in business on his own account and now has started to use a company of his called Stone International Limited to avoid any conflict with Mr Ye-Qing and any restraint and non-solicitation clauses that might apply.

[39] I have been asked to raise the corporate veil on this company by the applicant for enforcement purposes. I have no intention of doing so for these reasons:

- (i) Stone International Limited is not a party to these proceedings. There has been no consent for me to join the company.
- (ii) Mr Ye-Qing has no ownership stake in that company.

(iii) Stone International Limited has existed as an incorporated company for a number of years and has no contractual relationship with 24. It is owned by Mr Lang.

(iv) There is no relationship between CPL and Stone International Limited, except that Mr Lang is a director and shareholder in CPL. There is nothing preventing Mr Lang and Stone International operating in business. Although Stone and CPL use shared premises Mr Lang gave evidence that he operates Stone separately, including separate invoicing arrangements, and that Mr Ye-Qing has no involvement in Stone. I am also satisfied that Mr Lang and Mr Ye-Qing have restructured their affairs to endeavour to comply with the restraint if it was enforceable, by Mr Ye-Qing becoming an employee of CPL and Mr Lang using Stone International Limited. I find there is no evidence of a sham and avoidance arrangement, particularly as there was no completed agreement between Mr Ye-Qing and 24.

[40] Finally there is an allegation that Mr Ye-Qing and CPL have both breached the orders of the Authority. The allegation has been based on phone calls made by a solicitor, acting for the applicant, to five businesses. The deposed evidence put before me was that there were some instances where it “*appeared*” to involve activity associated with a breach of the Authority’s order: I find the evidence falls short of establishing for a fact that Mr Ye-Qing and CPL have breached the orders. The information is also contradicted by Messrs Ye-Qing, and Mr Lang who in particular says that no services have been provided to the customers since the orders of the Authority were made. I note also the evidence I heard from customers involved saying they were not approached by Mr Ye-Qing and arrangements have not been made with him since the Authority’s orders were made on 19 April.

[41] Mr Hansen has applied for damages and future damages based on estimates and asserted losses, and incomplete evidence of any financial records. In the circumstances there is not sufficient proof of any damages being incurred. The asserted losses of profit falls short of the standard required. I am further supported by the absence of any supply contracts with 24 and its customers. Therefore the claim for damages is dismissed.

[42] I therefore lift the orders put in place by the Authority on 19 April 2008.

[43] The applicant’s claims are dismissed.

[44] I note in conclusion Mr Lang’s undertaking that CPL will not use any confidential information belonging to 24 if it comes into possession of it.

[45] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority