

ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION AT PARAGRAPH
[3] OF THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 386/08
5141361**

BETWEEN CANON NEW ZEALAND LIMITED
Applicant

AND MARK ALLRIGHT
Respondent

Member of Authority: Leon Robinson

Representatives: David Hood, Counsel for Applicant
Doug Alderslade, Counsel for Respondent

Investigation Meeting: 7 November 2008

Determination: 11 November 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Canon New Zealand Limited (“Canon”) asks the Authority to grant urgent formal orders preventing the respondent Mr Mark Allright (“Mr Allright”) from acting contrary to restraint of trade provisions contained in the employment agreement between them.

[2] The parties were unable to resolve the problem between them by mediation.

[3] I order that the information and evidence gathered in this investigation and as disclosed in the pleadings lodged relating to Canon's intellectual property and in relation to its trading activities are not to be disclosed or published in any way by any person. The Authority's file in this application may not be inspected by any person without order of the Authority.

The facts

[4] The facts in this matter are largely not in dispute.

[5] Canon is a limited liability company which manufactures and supplies electrical goods including camera equipment, printers, copiers and related accessories. It also provides servicing for its product sales.

[6] Mr Allright has been employed by Canon as its Chief Financial Officer in that or an equivalent position since 23 April 2007.

[7] The terms and conditions of the employment relationship between the parties are recorded in a written individual employment agreement dated 21 March 2007 ("the IEA"). The IEA has this provision:-

15. Restraint of Trade

You shall not at any time during the term of this agreement and for a period of three months after the termination of employment with CNZ, establish, purchase or obtain an interest in, or become a director, employee or advisor, in, either directly or indirectly, any business operating in the same fields of endeavour as CNZ, and/or operating in competition with CNZ, within the same geographical area as your specific duties to CNZ took place, without the express written consent of the management of CNZ.

You further agree that during the restraint period, you will not offer any product or service (in competition with a CNZ product or service) to any third party who has been a customer of CNZ or a supplier to CNZ at any time within the twelve month period ending with the termination of this employment agreement.

You acknowledge that in consideration of this restraint of trade CNZ has provided you with an additional \$1,000 per annum. This additional payment is included in your base salary as noted in clause 9(a) of this agreement.

[8] There is also this provision in relation to confidentiality:-

16. Confidentiality

(a) You acknowledge that during the course of your employment with CNZ, you may become aware of information that is confidential to CNZ and its related companies (the "Canon Group"). Such information includes, but is not limited to:

- (i) Customer lists;*
- (ii) Sales and marketing information;*
- (iii) Product specifications and new product details;*

- (iv) *Financial and accounting information;*
- (v) *Terms of business and financial arrangements between the Canon Group and its customers, employees and other parties and all information that is disclosed to you on a confidential basis.*
- (b) *In consideration of CNZ employing you, you acknowledge and agree that all confidential information referred to in 16(a) above, is the sole property of the Canon Group. You will not, during your employment with CNZ, or thereafter, (except as authorised in writing by Canon New Zealand Limited), directly or indirectly, divulge to any person, firm or company, any of the aforementioned confidential information. On the termination of your employment, for whatever reason, you will return to CNZ all documents, and materials (electronic or otherwise) embodying or referring to the said confidential information.*
- (c) *You further agree not to make use of any information, materials or documents (electronic or otherwise) to which you may have access during the period of your employment or at any time thereafter except on behalf of the Canon Group.*
- You are also aware that should you be found in breach of this undertaking that CNZ may dismiss you under Clause 5(b) of this Employment Agreement.*
- (d) *You agree that during your period of employment, you will not deal in any new or second-hand or used equipment which CNZ sells or markets, except in the normal course of business and on behalf of CNZ (such as Canon authorised trade-in's which become Canon property).*

[9] On 2 October 2008 Mr Allright gave verbal notice of his resignation and advised Canon that he was leaving to commence employment with Fuji Xerox Limited. He was from that date placed on garden leave.

[10] By letter dated 3 October 2008 Mr Allright confirmed his verbal advice that he was resigning and further advised that his resignation would take effect from 31 October 2008.

[11] Mr Allright had intended to commence employment with Fuji Xerox Limited on 3 November 2008.

[12] Canon lodged this present application in the Authority on 30 October 2008.

The merits

[13] Canon has provided an undertaking signed by its managing director Mr Craig Robert Mason ("Mr Manson") to abide by any order the Authority may make as to damages sustained by Mr Allright by reason of any such orders as sought.

[14] Canon asks the Authority to grant interlocutory and interim orders. In the Authority, I prefer "preliminary" to "interlocutory". I refer to an injunction limited in duration, as an interim injunction. Principally Canon asks for a preliminary injunction granted on an urgent basis preventing Mr Allright from commencing or, if already commenced, continuing his employment with Fuji Xerox pending the issue of further injunctive orders. The further orders are interim injunctions restraining Mr Allright from specified conduct until after 31 January 2009. Canon also proposes orders in the alternative to these principal injunctive orders. The matters for substantive investigation are claims by Canon for damages and penalty against Mr Allright together with interest and costs.

[15] Canon says the restraint of trade clause is clear and enforceable and that Mr Allright's commencement of employment with Fiji Xerox notified as from 3 November 2008 is in breach of contractual obligations to Canon. Mr Allright replies in opposition and says that the restraint provision in the IEA is unreasonable and unenforceable. He further says, and I was asked to formally note the same and if necessary by consent order, that he undertakes to honour the obligations relating to confidentiality as set out under clause 16 of the IEA. In that regard Mr Allright says such an undertaking is adequate and sufficient to protect any proprietary interests claimed by Canon and as such, the injunctive resolution sought is unnecessary.

[16] There are settled principles which I regard as instructive. The starting point is that restraints of trade are contrary to public policy and are therefore void. This is because such restraints seek to interfere with a person's right to earn their living and inhibits the freedom and mobility of labour. Such restraints are therefore prima facie unlawful as contrary to public policy and they are upheld only where there is good reason. It has been recognised that such a good reason is where there is found to be a proprietary interest deemed worthy of protection and reasonably so. Such restraints have therefore been enforced where it is no wider than the circumstances of the case reasonably require. That reasonableness is assessed in the circumstances of the case according to the legitimate interests of the parties to the restraint and the wider public interest. Reasonableness is assessed at the time the restraint is agreed to.

[17] The purpose of preliminary injunctive relief is to protect an applicant party against injury for which it cannot be adequately compensated in damages in the event it succeeds at substantive investigation. Such an order is discretionary. Protection for the applicant needs to be balanced against the damage that might be done to a respondent through being prevented from exercising their rights, if the applicant does not succeed at substantive investigation.

[18] I accept that these are the four pertinent issues to be determined in deciding whether to grant a preliminary injunction¹:-

- (a) Is there a tenable arguable case?
- (b) If so, is there an adequate alternative remedy available to the applicant?
- (c) If not, where does the balance of convenience lie?
- (d) What is the overall justice of the case?

A tenable arguable case

[19] I acknowledge Mr Alderslade's reference to conflicting comments from the courts as to the appropriate standard. I adopt a tenable arguable case first test. The question turns on my assessment of the likely enforceability of the restraint of trade provision at clause 15 of the IEA.

[20] In *Brown v Brown*², Richardson J said³:-

It is well settled law that to be enforceable a covenant in restraint of trade should be no wider than the circumstances of the case reasonably require. Reasonableness in the relevant sense relates to the legitimate interests of the

¹ *American Cyanamid Co v Ethicon Limited* [1975] AC 396; [1975] 1 All ER 504 (HL). *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2 NZLR 140 (CA).

² [1980] 1 NZLR 484 at 491

³ See also *Bates v Gates* (1986) 1 NZELC 95,269 and *Gallagher Group Ltd v Whalley* [1999] 1 ERNZ 490 and *H&R Block Ltd v Sanott* [1976] 1 NZLR 213, *Credit Consultants Debt Services NZ Ltd v Wilson (No 3)* [2007] 1 ERNZ 252 cited to the Authority by counsel.

parties to the covenant and to the wider public interest. So, as Lord Reid observed in Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] AC 263, 300 -:

In every case it is necessary to consider first whether the restraint went farther than to afford adequate protection to the party in whose favour it was granted and secondly whether it can be justified as being in the interest of the party restrained and thirdly, whether it must be held contrary to the public interest.

[21] Mr Manson deposes that Mr Allright has an extensive knowledge and understanding of Canon's confidential information, trade secrets and customer relationships. He says Mr Allright has by virtue of his former very senior position with Canon knowledge of its strategic information. Mr Allright responds that Mr Manson exaggerates and overstates Mr Allright's role and the sensitivity of certainty information. He says he is surprised Mr Manson describes him as the second most senior executive at Canon.

[22] It is neither possible nor appropriate for me to resolve factual contests in this context. While I regard it disputed as a matter of degree, I accept that as a matter of fact, Mr Allright by the very nature and seniority of his role, was intimately acquainted with Canon's confidential information, trade secrets, customer relationships and strategies. I accept that Mr Allright does have knowledge derived from his service with Canon which is properly regarded as Canon's intellectual property. I am therefore satisfied these matters constitute an interest capable and worthy of protection.

[23] Mr Alderslade mounts an emphatic case for Mr Allright. He says the critical issue is the reasonableness of the absolute restraint sought by Canon. He invites the Authority to turn its mind to assessing the likelihood that the restraint provision is reasonable and should be enforced. Counsel says that if the Authority determines it is unlikely to be enforceable, then that should weigh heavily in determining that the application for interim injunction should not be granted⁴.

[24] Mr Alderslade refers to the helpful principles set out a decision of the Employment Court in *Credit Consultants Debt Services NZ Limited v David Wilson &*

⁴ Counsel cites *NWL Limited v Woods* [1979] 3 All ER 614

*Anor*⁵. He also refers me to three decisions said to affirm the necessity of a party seeking to enforce a restraint to demonstrate that such a restraint is necessary to protect its proprietary interests⁶. I shall refer to those cases as the *DB Breweries* line of cases.

[25] Counsel contrasts the *DB Breweries* line of cases with another line beginning with the English authority of *Littlewoods v Harris*⁷ cited with approval in other New Zealand cases⁸. I shall refer to this line as the *Littlewoods* line of cases. The essence of this line of cases is that in certain circumstances where confidential information is the proprietary interest sought to be protected, even despite the existence of a separate confidentiality provision, it may be appropriate to impose a complete non-compete for a period of time. Mr Alderslade disagrees with a previous Authority determination which preferred the *Littlewoods* line of cases over the *DB Breweries* line of cases. Counsel argues emphatically, if I paraphrase it using an authority cited, that "*It was not sound to enforce a covenant in restraint of trade merely to protect confidentiality*"⁹.

[26] Mr Alderslade therefore submits that as Canon has the protection of a comprehensive confidentiality clause in the IEA, it is not reasonable in those circumstances to issue an injunction. Counsel says that in all the circumstances, Canon is adequately protected in relation to its proprietary interest by the undertakings Mr Allright gives and repeated to the Authority, in relation to protecting confidential information.

[27] The Authority was not persuaded to adopt the *Littlewoods* line of cases in *Lee & Air New Zealand Limited*¹⁰ in the particular circumstances of the investigation then before the Authority.

⁵ unreported, WC12B/07, 1 May 2007, Shaw J

⁶ *DB Breweries Ltd v Marshall* [1994] 1 ERNZ 98, *Royal v Axon Computer Systems Ltd* [1994] 1 ERNZ 312, *Dillon v Chep Handling Systems Ltd* [1995] 2 ERNZ 282.

⁷ [1977] 1 WLR 1472

⁸ *Force Four New Zealand Limited v Curtling* [1994] 1 ERNZ 542, *Ravensdown Corp Ltd v Groves* [1998] 2 ERNZ 947, *The Broadcasting Corporation of New Zealand v Nielson* [1988] 2 NZELC 78,179.

⁹ *Fuji Xerox New Zealand Limited v Service* [1998] 1 ERNZ 438, Goddard CJ

¹⁰ unreported, AA347/07, 5 November 2007, A Dumbleton

[28] But while Mr Alderslade does a very good job to convince me, I too am not persuaded to adopt the *Littlewoods* line in this particular instance. However, I do not disagree with the principle in *Littlewoods*. I think it quite right that it is not sound to enforce a covenant in restraint of trade merely to protect confidentiality. I do not disagree with that principle. But I am not persuaded that that is the approach that ought to be adopted in this present instance in the particular circumstances of the case.

[29] Not all information gleaned will be confidential information. Only information which has the necessary quality of confidence in circumstances importing an obligation of confidence is capable of being regarded as confidential information. Whether or not there is an express contractual term as to confidentiality, the same obligations are imposed whether in equity or in tort. I think it far too absolute to say that the mere existence of a concurrent contractual term is sufficient on its own to place in doubt the legitimacy of a contractual restraint, when obligations of confidence subsist in the absence of an express contractual stipulation.

[30] Next, I think it wrong to always confine the property sought to be protected as generically "confidential information". Material too and no less intellectual property is commercial goodwill. The premium over and above the cost of the business assets. It is not only confidential information that is worthy of protection. I have no doubt that an employer is likely to equally desire protection for its goodwill that is, the premium paid for established custom and reputation. That intangible asset is separate and distinct from "confidential information". It is an interest capable of protection too. It is wrong I think to classify proprietary interests sought to be protected as only ever "confidential information".

[31] Mr Alderslade is right to point out that Mr Allright has no ability to influence customers and clients of his former employer. In that regard he says there is less of a case to be made for restraint by injunction. It is right that Mr Allright was not a salesperson. But he was a very senior executive at Canon.

[32] But the restraint relied is more than just about confidential information. It provides Canon with a period of three months to take steps to protect its property. Mr Manson says that during those three months Canon is able to take mitigating steps to adjust and accelerate its strategies and tactics. That is a situation or benefit distinct from entitlements to confidentiality. Mr Allright has agreed that Canon should have that benefit and the exchange of promises is sufficient consideration for it.

[33] There is one material distinction between all the cases cited to the Authority and this present one. These parties have been bound by a duty imposed by them under the *Employment Relations Act 2000*. They have been bound to act towards each other in good faith in all aspects of the employment relationship between them. This statutory duty of good faith is now directly relevant in my view.

[34] Mr Allright agreed in good faith to accept terms of his employment as set out in the IEA. One of those terms was that he would keep confidential information imparted to him in such circumstances. Another was that for three months after he ended his employment with Canon, he would not be employed by a competitor of Canon. That was a collateral agreement that Mr Allright appreciated was of significance and comfort to his employer. He agreed to that covenant in good faith and permitted his employer to rely on the good faith demonstrated in his doing so. I would think it quite wrong and a serious act of bad faith to have entered into that collateral contract having no intention of honouring it. But Mr Allright has never said he did that. In the end I think the sanctity of contract and the duty of good faith must prevail as justifiable interferences with Mr Allright's right to earn a living and the public policy considerations inherent in the mobility of his labour.

[35] The contentious restraint of trade is clear on its face in my view. It seeks to protect a legitimate interest of Canon's - its intellectual property. Mr Allright was a very senior executive at Canon. He is a highly qualified executive and cannot be regarded as unsophisticated in commercial or on his own evidence, legal matters. The IEA contains attestations of Mr Allright considering and having an opportunity to take advice about the provisions of it.

[36] As well, Mr Allright's level of seniority is to be contrasted with the scope of the restrictive covenant. It seeks a restraint of a three month duration. That period is not prolonged or extensive and on the contrary, I consider it relatively short. Such a period has been upheld as reasonable in many previous cases and in instances where the employees were not executive employees. Similarly too, I do not regard the contended geographical scope of the restraint excessive or unreasonable.

[37] I am satisfied that Mr Allright's intended new employer is a competitor of Canon's that stated intention if executed will be in breach of the IEA if commenced within three months of the cessation of service with Canon.

[38] Having accepted that restraint in good faith and permitting his employer to rely on his acceptance of that restraint and his good faith in doing so, I think it quite wrong to permit Mr Allright to resile from it.

[39] I conclude that the restraint at clause 15 of the IEA has been carefully framed for the purpose of protecting Canon's intellectual property that is its confidential information and its goodwill. At this point I regard the provision intrinsically just and reasonable in all the circumstances. Accordingly, for the foregoing reasons, I am satisfied that it is tenably arguable for Canon that restraint of trade clause in the IEA is enforceable against Mr Allright as being reasonable.

An alternative remedy

[40] I accept the submission made for Canon that if the orders sought are not granted but Canon succeeds at substantive investigation meeting in establishing its right to the injunctions sought, it will, in the intervening period, suffer loss in respect of which it will not be adequately compensated by an award of damages.

Balance of convenience

[41] This test involves considering the relative hardships between the parties.

[42] Mr Allright says that the market for senior financial positions is limited. He notes the economy is in recession and businesses are reducing staff. He says he

would have serious difficulty in obtaining a short term role (now) if that became necessary.

[43] I note the undertaking as to Damages given by Canon and also the assurance given in it that Canon has the means to meet the undertaking. This undertaking I regard as material.

[44] I conclude the balance of convenience lies with Canon.

Overall justice

[45] I now stand back and consider the overall justice of the case.

[46] As a matter of justice, I consider it would be quite wrong to permit Mr Allright to resile from his agreement, given in good faith, and relied on by Canon, that he would not work for its competitors for three months after their relationship ended. Contrasting his seniority with the scope of the provision, three months is relatively short.

[47] The sanctity of contract and the all-pervading mutual obligation of good faith must always prevail. I conclude then that the overall justice favours Canon.

The determination

[48] For all the above reasons, I now determine that Canon is entitled to the resolution it seeks. I grant:-

- (a) An preliminary injunction restraining Mark Allright, until after 31 January 2009, from:
 - (i) establishing, purchasing or obtaining an interest in, or becoming a director, employee or adviser, in, either directly or indirectly, any business operating in competition with Canon New Zealand Limited (including, but not limited to, Fuji Xerox Limited), within New Zealand; and

- (ii) offering any product or service (in competition with a product or service offered by Canon New Zealand Limited) to any third party who has been a customer of Canon New Zealand Limited at any time within the twelve month period ending on 31 October 2008.

Costs

[49] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Hood is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Alderslade is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

[50] I ask Mr Hood to provide a memorandum as to the further progress of this investigation without delay.

Leon Robinson
Member of Employment Relations Authority