



*The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this agreement. This includes, but is not limited to, information about the Employer's business.*

[4] The parties agree that as at least from November 2006 Mr Bath commenced setting up his own EPS factory when he ordered plant and machinery. Mr Bath's EPS factory trades through a company, EPS Foam (NZ) Limited ("EFL") which was incorporated on 22 February 2007. Mr Bath is the sole director of EFL and he and his wife own 50% of the shares. The other 50% of the shares in EFL are owned by Mr Bath's brother and his wife.

[5] On 31 July 2007, Koolfoam executed an Anton Piller order on the premises of EFL and Mr Bath's home. At that stage, EFL had been in production for one or two weeks. Among EFL's records were lists of names and telephone numbers which Koolfoam claim were taken from Koolfoam while Mr Bath was an employee for the purposes of using that information to compete with his employer. Mr Bath denies that.

[6] On 26 October 2007, the High Court granted an interim injunction restraining EFL, its officers, employees and agents from soliciting business from, or from approaching, contacting, using or disclosing to any other person, those persons or companies whose names or contact details appeared on an attached schedule. The names in the schedule were those identified in the contact list as customers of Koolfoam.

### **Issues for determination**

[7] The primary issue for determination is whether, on the balance of probabilities, Mr Bath sourced the information on his contact list from Koolfoam while an employee. If the answer to that question is yes:

- (a) Has there been a breach of the confidentiality provisions in Mr Bath's employment agreement;

- (b) Is Mr Bath in breach of his obligation of confidence;
- (c) Has Mr Bath breached the duty owed to his employer of fidelity and good faith?

[8] If there has been a breach or breaches, the final issue for determination is the damages that flow from such breaches. That will be the subject of a further inquiry should it be necessary.

[9] The respondent denies that he was under a duty of utmost good faith but admits that he was under a statutory duty of good faith and an implied duty of fidelity towards the applicant while he remained in its employment. The respondent denies that he has breached either of those duties owed to the applicant.

[10] The respondent admits that he owed a contractual duty of confidentiality but denies that he was under a separate equitable obligation of confidence towards the applicant. The respondent denies that he has breached his contractual duty of confidentiality owed to the applicant.

[11] Mr Bath denies having taken any confidential information from Koolfoam. Mr Cunningham submitted that the applicant's claim is based on the considerable degree of overlap between the respondent's list of customers and the applicant's list of customers. He said there was no evidence of Mr Bath having taken any physical properties from his former employer apart from two documents on company stationery and a discarded industry magazine.

[12] In summary, Mr Bath contends that:

- (a) He did not breach his duties of good faith and fidelity which duties did not survive the termination of his employment.
- (b) He did not make use of any confidential information.
- (c) The information was not a trade secret or highly confidential.
- (d) The information had a shelf life of six months which was now over.
- (e) Mr Bath's position as a process worker did not involve such a high degree of trust as to make him a fiduciary.

- (f) The applicant did not put particular emphasis on the confidentiality of the information.
- (g) The suit in equity for breach of confidence is outside the jurisdiction of the Authority.
- (h) The inclusion of a contractual confidentiality provision displaced any equitable duty of confidence.

[13] Mr Cunningham made lengthy submissions asserting view that the confidentiality provision excluded the equitable obligation of confidence. However, what needs to be established is that Mr Bath took confidential information during the course of his employment and that he used it to the detriment of his employer.

[14] I accept the applicant's contention that a major problem for Mr Bath is that his contact list contained numbers he could not credibly have obtained from any source other than Koolfoam. He was indiscriminate in the numbers he sourced from Koolfoam as he had no idea Koolfoam no longer dealt with some of the contacts, for example, that some companies had been liquidated or, in the case of one individual, died. Nor was he aware that various numbers he found were for particular people or had been set up for a specific project and were no longer active. Mr Bath was not aware of these things because he was a factory worker and not familiar with Koolfoam's clients.

[15] Mr Bath was employed as a process worker whose job was cutting polystyrene blocks for \$17 an hour. Mr Cunningham said Mr Bath was not a sales representative or senior executive to whom the applicant trusted highly confidential information that was critical to the successful operation of the business. That is correct. It means therefore that Mr Bath must have gone out of his way to obtain the information that he subsequently used to set up his own business and compete with Koolfoam.

#### **The Source of the Information Found at EFL and Mr Bath's House**

[16] I found Mr Bath to be an unreliable witness. The applicant provided a schedule comparing statements made in the affidavits about the source of the contact information to the Authority. The schedule clearly highlights contradictions between Mr Bath's first affidavit sworn on 15 August 2007 and his second affidavit sworn on

18 October 2007. Claims made in Mr Bath's first affidavit were tested by Mr Maiden, a director of Koolfoam, and it was apparent that the methods Mr Bath claims to have used to source information simply would not yield the results he claimed. Mr Bath changed his evidence between Affidavit 1 and Affidavit 2 in respect of 85 out of 108 contact details.

[17] Mr Cunningham submitted that, at best, it could only be inferred from the coincidence of names on the applicant's and the respondent's lists that the respondent made any use of the information owned by his former employer. In an attempt to explain the differences between the first and the second affidavit, Mr Cunningham asserted that Mr Bath did not state in either affidavit that he had found customer contact details solely by reference to any one source but identified in Affidavit 1 one source that he had used as the Yellow Pages for example. In the second affidavit, Mr Bath proposed that he had found customer contact details from sources other than those referred to in his earlier affidavit. The sources were not necessarily mutually exclusive but complementary to one another.

[18] The far more likely explanation for the differences between the two affidavits is that the second affidavit was an attempt to explain difficulties with the first affidavit that were pointed out by Mr Maiden in his affidavit. Some of the explanations provided in Affidavit 2 are utterly incredible. For example, that unlisted or difficult to obtain numbers were sourced from vans driving by. That explanation, which was not in the first affidavit, was used seven times in the second affidavit. Other equally implausible explanations were used to explain away unlisted or defunct numbers. Mr Bath said he had found them in the 2004 or 2005 Yellow Pages because he had *"three books in my cupboard and sometimes pick up an old one"*. I find it highly unlikely that someone would use old editions of the Yellow Pages to attempt to source information regarding clients for a company he was setting up in 2006.

[19] Mr Bath also said he wrote some numbers in his 1999 Punjabi telephone directory when he was getting his house plastered/looking for a painter/concrete supplier/his brother wanted polystyrene sheets/plasterer contact for the family. I accept Ms Law's contention that this information unravelled when he was questioned during the hearing. He gave evidence that Hitex's number had been entered in his directory when Hitex plastered his house in 1999. Then he said some time after 1999,

then it could be a bit after that, then he could not remember, then it could have been 2001.

[20] In Affidavit 2 at p.3 regarding Hitex, he said his brother, Jaswant Singh, inquired about coated polystyrene sheets from Hitex for his house in Kimpton Road, Papatoetoe “ *and I put their telephone number in my Punjabi directory 1999 telephone list.*”

[21] Later, the same explanation was given as to how he obtained the number for David Plastering: “*I got the number when he plastered my house.*” When the contradiction was put to him, the response was that other workers may have plastered some of the property.

[22] I accept the contention that an examination of the Punjabi directory supports the proposition that Mr Bath inserted the numbers after he was served with the proceedings. Mr Bath’s explanation for too long out of date numbers (there were several 027 mobile numbers) were that when he opened the factory, somebody called and gave a false landline number. He said “*someone claiming to be from Insulator Floor Systems Limited rang me to ask about prices for polystyrene and gave me the number which turned out to be for a private house*”.

[23] During the hearing, his explanation for such unlikely evidence was that it must have been someone from Koolfoam who called into the factory or rang with the information. However, his evidence under cross-examination was that the lists were compiled approximately a month after he left Koolfoam, that is in June 2007. That must rule out any involvement by Koolfoam in such duplicity as Mr Maiden learned of Mr Bath’s new business on 20 July 2007, a month after Mr Bath says the lists were compiled. In any event, such unlikely explanations are simply not credible.

[24] Mr Bath also said that a customer or another individual gave him a number or business card and he or someone else obtained it from an unidentified building site. He used that explanation ten times. One or other of these explanations used once may possibly have been credible. Used on that number of occasions to explain away difficulties simply indicates that Mr Bath was not telling the truth.

[25] I also accept the applicant’s evidence that there were numerous incongruities in Mr Bath’s evidence. Following are some examples:

- Fulton Hogan – The mobile number on the contact list was for Liam, the site contact given to Koolfoam on the State Highway 20 Project for delivery of polystyrene in early 2006. The job had long been completed and that person had nothing to do with the allocation of supply contracts.
- The number on the list for Rockcoat is a direct dial which matches Koolfoam's records and is not relevant to the supply of polystyrene.
- The contact number for Watty Avondale is for a mobile number for the project services representative for Granosite who died in 2004.
- The number in the contact list for Fletcher Construction is a temporary site office no longer occupied by Fletcher Construction.
- The number in the contact list for Works Infrastructure is a direct dial for Andrew Eng who was a civil estimator.
- The number for Ownitt Homes is a recorded mobile number which is not in the Yellow Pages. The same applies to Coast Foundations.
- Mr Bath claims to have found a number for Asten Homes in the Yellow Pages. However the Yellow Pages listing attached to Mr Bath's affidavit is for Asten Building Precision. He does not explain why he wrote Asten Homes. Koolfoam's customer details, however, relate to Asten Homes.
- The recorded mobile number for Footing and Flooring Limited is not in the Yellow Pages, neither is the number for Gill and Gundry.
- The recorded details for Mason Brick and Plaster Brick are both recorded even though Mason Brick is the new name for Plaster Brick. Mr Bath was obviously ignorant of that when he copied the details from Koolfoam.
- A number for Placemakers Whangarei is a recorded mobile number for an employee who is not in the Yellow Pages.

[26] Mr Maiden has been able to trace 103 of the 108 numbers on the contact list back to Koolfoam. Mr Martin Patterson, a Koolfoam customer, gave evidence that Mr Bath solicited a business card from him when Mr Patterson picked up an order from Koolfoam. I accept the applicant's contention that there is ample evidence that the contact details were sourced from Koolfoam.

### **High Court Decision and Confidentiality of Information**

[27] Ms Law submitted that the issue of misuse of confidential information was considered by Her Honour Justice Andrews in the High Court on 26 October. She concluded:

*I am satisfied that [EFL] could be held liable if it is found that confidential information has been disclosed to it by [Mr Bath] in breach of a duty owed by [Mr Bath] to [Koolfoam], and [EFL] has made use of that information.*

[28] The confidential information was the information found in Mr Bath's contact list. Ms Law submitted that if I determined that Mr Bath took the information in his contact list from Koolfoam while he was an employee, it was not now open to Mr Cunningham to challenge the decision of the High Court that liability would then ensue.

[29] Ms Law said Mr Cunningham argued vigorously in the High Court that the information did not have the necessary characteristics of confidence. In granting an injunction restraining EFL from using that information, the High Court firmly rejected Mr Cunningham's submission. The only issue for the High Court was the possibility that the Authority might find, after hearing from the parties, that Mr Bath's evidence should be accepted.

[30] At the conclusion of the hearing in the Authority, Mr Cunningham made it plain he would be revisiting this matter. Ms Law submitted that the Authority was bound by the High Court decision on that point.

[31] I do not read the High Court decision as asserting definitively that such information would be confidential information. However, I have no doubt that that information is confidential information. Mr Cunningham's contention was that almost all of the names of the applicant's customers could, with due diligence, be found on the internet and by reference to the telephone directory as well as directly approaching users of polystyrene. However, there are a significant number of

exceptions to that contention, some of which I have identified earlier in my determination.

[32] I have no doubt that Mr Bath went out of his way while an employee of Koolfoam to access customer lists held by his employer and that he did not obtain that information from external sources as he maintained,

[33] In *Peninsula Real Estate Ltd v. Harris* [1992] 2 NZLR 216, Tipping J set out at pp.218-219 the following propositions of law from the decided cases:

1. *In the absence of a valid restraint clause a former employer cannot prevent a former employee from competing.*
2. *A former employer cannot normally therefore in such circumstances prevent a former employee from contacting or even soliciting clients or customers of the former employer.*
3. *An employee after ceasing his employment may not use clearly confidential information obtained in the course of that employment for the purposes of competing with his former employer or in any other way detrimental to his former employer's interests.*
4. *What amounts to confidential information for this purpose is not susceptible to abstract definition. It will depend on the facts of each case.*
5. *There is now a clear trend of authority to the effect that whether one classifies the following information as confidential or not a departing employee may not take with him customer or client lists for the purpose of using them in a competing role.*
6. *Neither may a departing employee deliberately memorise such information for that purpose.*
7. *Whether the departing employee takes customer lists or not generally he may not solicit or approach a client of his former employer in respect of a transaction current at the time of his departure.*

[34] Mr Cunningham maintained that the information that Mr Bath had taken was not confidential information. He asserted that there was nothing novel about Koolfoam's customer list and that anyone in the polystyrene manufacturing business could, with reasonable diligence, reconstruct the information. To a certain degree, that assertion is correct. However, in the judgment of Megarry J in *Coco v. A M Clark (Engineering) Ltd* [1969] RPC 41 at p.47, Megarry J said:

*Something that has been constructed from materials in the public domain may possess the necessary quality of confidentiality: the something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain.*

[35] Furthermore, the issue is whether Mr Bath did reconstruct the information found from the sources he claims or whether he took it from his employer. I have found he did not reconstruct it.

[36] In *Force Four New Zealand Ltd v. Kurtling and Tuhiwai* (EC Auckland 14/6/94), Travis J at p.13 stated that customer lists and information are properly categorised as confidential information. Mr Bath did not acquire customer information through or as an incidence of his previous employment. Koolfoam maintains that as part of his planning for his new EPS venture, he carried out the following actions while an employee of Koolfoam. He solicited business cards from customers visiting Koolfoam. In 2007 he then approached the customer from whom he had solicited a business card offering good rates for EPS. He copied customer contact details from Koolfoam's premises. He then used that information to compete with Koolfoam.

[37] I accept that Mr Bath did these things, and I accept that that amounts to misuse of confidential information.

### **Fidelity and Good Faith**

[38] In *Schilling v. Kidd Garrett Ltd* [1977] 1 NZLR 243 at 247, Richmond P stated that there was no fixed test applicable in the circumstances regarding conduct which is a breach of the duty of fidelity. The question was whether the conduct in question would be looked upon by a person of ordinary honesty as dishonest conduct towards the employer.

[39] In *Walden v. Barrance* [1996] 2 ERNZ 598 at 616, the Court said:

*During the employment the employee is under a duty (called the duty of fidelity) to do nothing deliberately that is likely, by ordinary standards of foresight, to injure the employer's business. The prohibition includes competing with the employer directly or by working at the same time for a competitor. **Competing for this purpose can include hostile acts during the employment in preparation for competing after it has ended. Common examples are removing, copying, memorising, or compiling for the employee's as opposed to the employer's purposes a list of customers or any other information, soliciting clients prior to departure, and any other acts by the employee that involve an actual incompatibility in important respects with the employment relationship or the conflict with the interests of the employer, to serve which it remains the employee's duty so long as the employment subsists.***

[40] I accept Ms Law's contention that, having found that Mr Bath took the information in his contact list from his former employer while an employee, on the test outlined above he is plainly in breach of the duty of fidelity. Mr Bath breached his contractual obligation of confidence. He also breached his duty of fidelity and his good faith obligations..

[41] In making this decision I have considered Mr Cunningham's submission that Mr Bath may not entirely have understood some of the questions that he was asked. I did have some concern about that at one stage, but I am satisfied that overall Mr Bath had no difficulty in understanding the matters that were being put to him. Had Mr Bath had that degree of difficulty with English, I would have expected that Mr Cunningham would have said that there was a need for an interpreter. Mr Bath understood the questions; he had difficulty providing the answers.

### **Damages**

[42] The issue of damages is something that was not to be decided in this case. It would clearly be helpful for the parties to have a discussion about the issue of damages before deciding whether or not to return to the Authority to have the matter further assessed.

### **Costs**

[43] Costs were reserved. The parties should endeavour to settle the matter of costs. If they are unable to do so, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of the Employment Relations Authority