# New Zealand Employment Relations Authority Decisions



## Simon Beirne Limited v Selinger (Christchurch) [2017] NZERA 1116; [2017] NZERA Christchurch 116 (6 July 2017)

Last Updated: 14 July 2017

**IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH**

[2017] NZERA Christchurch 116
3011653

BETWEEN SIMON BEIRNE LIMITED Applicant

A N D KYLE SELINGER Respondent

Member of Authority: Christine Hickey

Representatives: Penny Shaw, Counsel for Applicant

Linda Ryder, Counsel for Respondent

Investigation Meeting: 19 June 2017 at Christchurch

Date of Determination: 6 July 2017

**INTERIM DETERMINATION OF THE AUTHORITY**

**SBL's claims**

[1] On 26 May 2017, the applicant Simon Beirne Limited (SBL) lodged a Statement of Problem, which seeks (amongst other things) permanent compliance orders requiring Kyle Selinger to comply with a number of express post-termination contractual obligations contained in his employment agreement.

[2] SBL seeks penalties and damages from Mr Selinger for breaches of his employment agreement and implied obligations during his employment. I have scheduled the investigation to consider the substantive matters for 18-20 September

2017.

[3] SBL has also applied for interim orders to have Mr Selinger comply with what it says are clauses in his employment agreement imposing post-termination duties of confidentiality, a duty to return all SBL property at the end of his employment, and a

non-competition clause (restraint of trade).1 SBL also lodged the required undertaking as to damages and a request that the matter be dealt with urgently.

[4] Kyle Selinger does not accept that the restraint of trade provisions are enforceable. He accepts that he owed a duty of confidentiality and a duty of fidelity to SBL during his employment. He accepts that he acted in breach of his duty of fidelity to SBL during the last part of his employment.

[5] He says that he has already destroyed a yen chart he used during the last part of his employment, and says he does not have any other physical or digital information or property belonging to SBL.

[6] Clause 17 imposes a restraint of trade on Mr Selinger that seeks, at its simplest, to prevent him working with or for any customer of SBL for a period of 6 months after the end of his employment. Mr Selinger says that the restraint is unenforceable.

[7] Mr Selinger resigned from SBL and his last day of employment was 13 April

2017.

[8] The parties attended mediation on 7 June 2017, but have been unable to resolve matters between them.

[9] On 12 June 2017, Mr Selinger raised a personal grievance of unjustified constructive dismissal. As yet, Mr Selinger has not lodged a claim with the Authority and I have not had any evidence of the grievance in front of me in these interim proceedings. In his affidavit, Mr Selinger deposed that he resigned from SBL because of how it had treated him.

[10] I heard the application for interim relief on 19 June 2017. I heard submissions from counsel for both parties. I have determined this interim injunction application on those legal submissions supported by untested affidavit evidence from Simon Beirne, SBL's managing director, and Mr Selinger.

[11] Because I was not able to question the witnesses, and no cross-examination took place, no conflicts in the evidence were able to be resolved. Therefore, any

findings of, or discussions about, the facts at this interim stage are provisional only.

1 Clauses 15, 16.5 and 17 of the individual employment agreement.

My view on these matters may change after the claims have been fully investigated and the witnesses properly examined during the substantive investigation meeting.

**The facts**

[12] Simon Beirne Limited (SBL) operates a broker car importing business. It supplies motor vehicle dealerships with imported vehicles from Japan and the United Kingdom.

[13] Kyle Selinger commenced employment with SBL on 9 April 2013 as a full time salesperson. He signed an employment agreement on 10 April 2013, the day after he started work for SBL.

[14] In addition to importing motor vehicles, SBL finances floor plans to car dealers. This involves financing the purchase of motor vehicles for the dealer to sell. As part of an agreed floor plan, the customer agrees to purchase vehicles exclusively through SBL. Mr Selinger was not involved in that aspect of SBL's business, other than advising dealerships that the opportunity existed.

[15] Mr Selinger was not involved in importing vehicles from the United Kingdom for SBL.

[16] Mr Selinger has been involved in the car sales industry for over 22 years. He has been involved in importing vehicles into New Zealand from Japan since 1997. As part of that work, Mr Selinger lived in Japan for eight years. He has Japanese residency. He speaks Japanese. He is married to a Japanese citizen. He regularly travels to Japan for work and family commitments.

[17] Mr Selinger says that when he began working at SBL he had already had a long association with the Japanese agent, Sei-Shin Co Limited (Sei-Shin), from when he was self-employed and living in Japan. Mr Selinger also used Sei-Shin as an agent to buy cars from Japan while working for SBL.

[18] Mr Selinger says that in 2015, he was approached by a long-term friend of his, Bob Fowler, who is a director of Westside Autos Limited (WSA) in Perth, Western Australia. Mr Fowler asked him if he was still involved in importing motor vehicles. He advised Mr Selinger that Australian government regulation of importation of motor vehicles was freeing up. Mr Selinger says he introduced Mr Fowler and WSA to the applicant as customers.

[19] Since 2011, SBL, through Simon Beirne, had been working to explore the potential market in Australia. Mr Beirne worked with Australian industry representatives, including the Sandher brothers, to lobby for policy enabling SBL to import used vehicles into Australia.

[20] The parties agree that the applicant, through Mr Selinger, sold approximately

68 vehicles to WSA in 2016.

[21] In order to import vehicles into Australia, SBL used the services of Top Secret Imports (TSI), which is run by Jack Sandher and his brother, Garry Sandher. SBL provides vehicles from Japan and ships them to Australia. TSI prepares the vehicles for compliance and takes care of any necessary paint and panel work or grooming, the registration of the vehicles, and assists with the delivery to SBL customers in Australia. Every one of the 68 vehicles sold to WSA by SBL passed through TSI.

[22] Mr Selinger worked closely with Mr Fowler and the General Manager of

WSA, Idan, and with TSI.

[23] Mr Selinger says that Mr Fowler told him Mr Beirne had said SBL lost money because of trading with WSA. Mr Selinger believes SBL lost $100,000.

[24] Mr Selinger says that in February 2017 Mr Fowler told him he wanted to order a further 15 cars.

[25] On 7 February 2017, Garry Sandher sent Mr Selinger an email containing TSI's thoughts for ongoing business with WSA. The document contained TSI's analysis of the types of models of cars and vans that would work in the Australian market as well as the possibility of SBL sourcing Harley Davidson motorcycles from either Japan or the USA for sale to WSA. It would be a new business opportunity for TSI as well as for SBL. Mr Sandher concluded:

WSA needs a long term approach and needs to continue to experiment with these models to find out what works.

[26] Also in March 2017, Mr Beirne says Mr Selinger advised him and the Chief

Financial Officer of SBL, David Friend, that WSA wanted to purchase 30 more

vehicles2 from SBL. Mr Selinger expected, as usual, to deal directly with Mr Fowler about the order or orders.

[27] On 5 March 2017, Mr Beirne sent an email entitled "Perth WSA Pending Re-

Engagement" to SBL's Board of Directors. The email informed them:

Bob has an appetite for other models.

He's prepared to give the suggested and outlined vehicles a go that

[TSI] has recommended.

I'm just not sure how far away TSI are from having sign off at their compliance centers for these suggested makes and models.

However before we go back to Bob we need to make a decision on the viability of this transaction and see if we can make a $!

...

I suggest we meet and chat this through further as there is some low lying fruit here that we should be picking up and we now pretty much know our "fixed" overheads, Bob will just have to pay a little more!

Let me know your thoughts and we will schedule a meeting.

[28] On 15 March 2017, the SBL board discussed its concerns about the profitability of supplying cars to WSA. Mr Beirne told Mr Selinger that the board had decided that it was not profitable enough under the current arrangement to keep trading with WSA.

[29] Mr Selinger had no permission at that point to place any further orders for WSA. He did not progress any order for vehicles. However, he was keen for SBL to continue to trade with WSA.

[30] There is a dispute about who asked Mr Friend to do some work on the issue of profitability of trading with WSA. It is agreed that happened after the 15 March board meeting. Mr Beirne and Mr Selinger worked with Mr Friend to analyse the costings to see whether it could be profitable to continue trading with WSA. Mr Selinger says that Mr Sandher from TSI also assisted.

[31] On 24 March 2017, Mr Friend sent the resulting document to the board and to

Mr Selinger. He reached a conclusion after "some deep number investigations." He took into account matters such as the shipping cost, the agent's fee, SBL's fee and

2 The evidence is unclear whether there was one order for 15 or 30 cars, or two different orders.

compliance and delivery costs. He concluded that the SBL fee would need to increase in order for SBL to make close to $1,000 profit per car. He concluded:

If this is an acceptable margin and if Kyle thinks he can sell cars to Bob at this price range then I would support the buying of cars for Bob. From my side of the fence I think this is an acceptable margin, there are no trips needed any more, we simply buy the cars out of Japan and send them on their way. This is no different to what has been agreed, we can continue to review and adjust as the cars flow through and if there are any that are outside the box then we can discuss. If Kyle can price the cars under this arrangement and is unable to sell them to WSA at this price then that will bring this to an end, but I feel

we need to at least try it.

Thoughts welcomed.

[32] Mr Selinger says that Mr Beirne told him he would have to tell Mr Fowler that the cost of supplying vehicles would go up because compliance costs had risen. That was not correct. Mr Selinger was unwilling to do that, and told Mr Beirne he would have to do that himself.

[33] On the same day, some hours after Mr Friend's email, Mr Fowler sent

Mr Selinger the following email:

Hello Kyle,

... Do you or have you handled this model. On another note, we have just realised that some six vehicles we purchased from you have still not been delivered to West Side's. Some six months since we paid for these cars. I admit that we failed to pick this up till now as the flagging system in our computer was malfunctioning. Can you shed some light on this matter for me.

[34] Mr Selinger replied that evening at 7.19pm:

Hi Bob,

Yes the Aphard are a good target ... I am on the case with your order

now Bob.

Re the vehicles that haven't been delivered I have spoken to Garry [of TSI]and he advises these ones have been selected by "DODARS" and are currently in various stages going through the audit process, Garry says he has spoken to Idan and advises they should be through that process within 10 to 12 days.

I agree this is frustrating Bob and I hope we can deliver a much smoother and faster process moving forward.

[35] Mr Selinger says when he wrote, "I am on the case with your order now" he was referring to the 30 cars previously requested. However, he says that he did not yet have permission to purchase those for supply to WSA.

*Possible breach of confidentiality*

[36] On Monday, 27 March 2017, Mr Selinger sent Mr Sandher at TSI a copy of Mr Friend's 24 March email. SBL says this was in breach of his duty of fidelity because it gave confidential information to TSI. It claims that the fees it paid and the amount of profit it sought were confidential information.

*Mr Selinger's resignation*

[37] On 30 March 2017, Mr Selinger resigned. He provided two weeks' notice with his last day of employment to be 13 April 2017. Mr Beirne was away on holiday at the time.

*Possible breach of duty of confidentiality*

[38] Mr Friend gave Mr Selinger the option of working from home or at the office. On 1 April 2017, Mr Selinger sent a photograph of an SBL yen chart to his home email address. He says he did that because he was working from home. He does not accept that the yen chart contains confidential information amounting to the applicant having a proprietary interest in the yen chart.

[39] Mr Selinger says that yen charts are common within the industry and versions of the chart could be downloaded off the internet. The utility of the yen chart changes day by day depending on the exchange rate and the variables loaded into the formula used to create the chart. A hard copy of the yen chart is therefore only useful for that particular exchange rate.

[40] Nevertheless, Mr Selinger accepts that the yen chart that he sent to his home email address was the property of the applicant and says that he has deleted a copy of the photograph he sent to his home email address in order to comply with his obligations in clause 16 of his employment agreement.

*Possible breach of duty of fidelity*

[41] After Mr Selinger resigned, and was working out his notice period, Mr Fowler asked Mr Selinger to help source some vehicles from Japan. Mr Selinger understands that WSA then contacted TSI to arrange for the purchase. Mr Selinger agrees that he briefed Sei-Shin on what vehicles to purchase. He says that Sei-Shin purchased the vehicles on behalf of TSI which then on-sold them to WSA.

[42] Mr Selinger says he did not make any fee from this transaction and his involvement was limited to briefing Sei-Shin.

However, he accepts that in acting in the way he did he may have breached his duty of fidelity to SBL as his employer. He says that any damages for that transaction would be limited to the potential profit that SBL would have made from the sale of those five specific vehicles, being a maximum of $5,000.

[43] Mr Selinger was bound by a duty of fidelity and a duty of confidentiality while he was employed.

[44] Mr Selinger denies he acted in competition with SBL, as he did not charge

WSA for sourcing the cars through Sei-Shin.

[45] SBL says that, despite not making any profit on the supply of the five vehicles to WSA, Mr Selinger acted in competition with SBL. It says he did so to set himself up in a strong position to compete with SBL by himself selling vehicles to WSA once his employment ended. In essence, SBL argues that Mr Selinger boosted his own personal position at SBL's cost.

*Post-termination events*

[46] When Mr Selinger finished his employment, Mr Bernie arranged for Mr Selinger's emails to be forwarded to him. On 19 April 2017, Mr Sandher of TSI sent Mr Selinger an email at SBL, which came to Mr Beirne's email address. Attached to that was an invoice from Sei-Shin showing on 3-5 April 2017, Mr Selinger had been involved in purchasing five Nissan vehicles from Japan for shipping and importation into Western Australia. The invoice was made out to TSI, not SBL.

[47] Mr Beirne considers that Mr Selinger personally bought the vehicles and was using TSI as his agent because he is not licenced to import vehicles into Australia. He assumes Mr Selinger did so in competition with SBL because he wishes to be the ongoing supplier of Japanese vehicles to WSA.

[48] Mr Beirne says that on 20 April 2017, he emailed Mr Selinger asking for an explanation for the invoice for TSI and the purchase by Sei-Shin, and reminding him of his obligation not to work for any customer of SBL for six months after his employment ended. He says Mr Selinger did not respond.

[49] On 21 April 2017, SBL's counsel, Ms Shaw, wrote to Mr Selinger alleging he had breached his post-employment obligations. On 27 April, Ms Ryder responded that she was taking instructions and asking for a copy of any initial correspondence between the parties about the commencement of the employment relationship.

[50] Sei-Shin has told Mr Beirne it no longer wishes to act for SBL, at least partly because Mr Selinger no longer works for SBL. TSI has admitted it dealt directly with WSA and Mr Selinger, knowing that SBL was not involved in the purchase of the five vehicles. There is no evidence TSI will not supply services to SBL again.

[51] Almost a month after Ms Ryder's response on 27 April, on 26 May 2017, SBL

lodged this application in the Authority.

[52] Mr Selinger says he hopes to set up a business to import vehicles from Japan, as that is where his expertise lies. However, as at the date of the investigation meeting he was not in any kind of employment and was not importing cars on his own account.

**The employment agreement**

[53] The relevant clauses of the employment agreement are:

**15. Confidentiality**

15.1 Any information which you acquire either directly or

indirectly as a result of your employment with us is deemed to be confidential and is to be treated in the

strictest confidence. After termination of your

employment you will still not be able to use or pass on any such information except where the information is already publicly known. This includes information, strategies, processes, materials, costs or secrets relating to any aspect of our business or to our

customers, franchises, associated companies or subcontractors.

15.2 We also require that you do not make any statement or take any actions at any time which are intended to or likely to adversely affect our business or reputation, and we also require that you do not make or release media statements relating to our business or discuss our business publicly without our written consent, except within guidelines established for the position.

**16. Inventions and Care of Property**

...

16.5 On notice of termination of employment (however caused) all such documents and/or equipment as well as any other notes, memoranda, computer software, photographs, drawings, records or other materials in any way relating either directly or indirectly to our business which you may have will be immediately returned to us.

**17. Non Solicitation of Clients and Employees**

17.1 Except with our prior written consent you will not for a period of 6 months after you end your employment with us:

17.1.1 Entice or seek to entice our existing employees to work for any other employer, or

17.1.2 Offer to perform services or supply products (other than services or products not currently offered or provided by us) or otherwise solicit or entice the custom of; or

17.1.3 Seek an agreement or contract (other than an agreement of employment or a contract for services for products not currently offered or provided by us) with; or

17.1.4 Perform services or supply products (except under an agreement of employment or for services or products not currently offered or provided by us) for; or

17.1.5 Use your name or permit your name to be used for the purpose of or with a view to obtaining the custom of:

any customer of ours to whom we have provided services or supplied products during the period of 12 months preceding termination of this agreement; or any holding Company of such a customer or any subsidiary Company of such Company or holding Company.

17.2 It is acknowledged by both of us that the remuneration under this agreement includes a component in recognition of this restraint.

17.3 You acknowledge that any relationships you form with our clients are as a result of your employment with us and that any breach of this clause will cause us damage. Accordingly, you agree that should you breach this clause, you will pay us the amount specified in the Second Schedule.

Note: This clause has been included in your agreement to protect our interest in our clients. It does not prevent you from being employed by a competitor of ours. It specifically deals with approaching our clients or soliciting their custom during the restraint period but we can agree in writing on variations in specific circumstances.

[54] Despite clause 17.3 referring to the payment of an amount specified in the

Second Schedule, no such amount is specified in the Second Schedule.

**Determination**

[55] When determining whether to exercise my discretion to order interim injunctions, I am required to act judicially by applying the law relating to interim injunctions. The principles relating to interim injunction proceedings are well established.

[56] The issues to be determined are:

(a) Whether SBL has an arguable case for enforcement of the restraint of trade, confidentiality and return of documents clauses;

(b) If so, is there an adequate alternative remedy other than injunctive relief?

(c) Where does the balance of convenience lie until the Authority holds its substantive investigation (in September 2017) and then issues a determination (perhaps up to a month later which would be at the end of the 6-month period of restraint)?; and

(d) What is the overall justice of the case?

**The law on restraints of trade**

[57] A restraint of trade covenant is different to other contractual obligations. The starting point is that restraints of trade are contrary to public policy and are void and unenforceable. There are strong policy reasons for that principle to apply if the purpose and effect of a restraint is to prevent a worker from their right to work in their area of expertise and skill, and compete in the free-market.

[58] However, a restraint of trade can be enforceable if the employer can prove it is reasonably necessary to protect some

proprietary interest(s) and is not simply to limit competition.

[59] An employer may possess a proprietary interest in trade secrets, confidential information and its business or trade connections.

[60] SBL submits it has a proprietary interest in its customers and in its pricing structure and says the restraint on Mr Selinger seeks to protect that interest, not to stop him working in the industry.

[61] The onus of establishing that a restrictive provision is reasonable is on the employer. Such a provision should be no wider than is required to protect the party in whose favour it is given. The reasonableness of the restraint is to be determined at the time the agreement was entered into.

[62] The reasonableness of a restraint clause is to be assessed in the circumstances of each case according to legitimate interests of the parties to the restraint. This involves a balancing of the respective positions between the employer and employee.

[63] The Authority has the ability to amend a restraint provision under s 162(f) of the Employment Relations Act 2000 (the Act) and s 8 of the Illegal Contracts Act

1970.3 However, that is not something I am considering at this interim stage as I have

not had submissions on it and have not had the opportunity to ensure s 164 of the Act could be complied with in time to issue this determination in a timely manner.

[64] Principles to be taken into account in the assessment of whether a restraint provision should be upheld are as follows:

3 Which remains in force only until 1 September 2017 when the Contract and Commercial Law Act

2017 comes into force. The Illegal Contracts Act 1970 has been repealed by the 2017 act.

(a) The restraint will only be enforceable to the extent that it is required to protect a proprietary interest of the employer.

(b) The reasonableness of the restraint – timeframe and geographic area –

is relevant in determining reasonableness.

(c) The scope of the restraint will be considered.

(d) The relevant bargaining power of the employer and employee is also relevant.

(e) A restraint is generally unreasonable if its injurious effect on the employee is greater than its benefit to the employer.

(f) For a restraint to be valid and enforceable, an employer must show that valuable consideration was given to the employee in return for it.

[65] SBL seeks three interim injunctions:

• Restraining Mr Selinger from supplying cars to and/or seeking an agreement or contract with and/or soliciting or enticing any customer that had dealings with SBL in the 12 months before Mr Selinger's employment ended, for 6 months from 13 April 2017 until 13 October

2017 (clause 17).

• Requiring Mr Selinger to return all documents relating to SBL's

business (clause 16.5) immediately.

• Preventing Mr Selinger using and passing on confidential information belonging to SBL (clause 15).

[66] The threshold test for determining whether SBL has an arguable case that after a substantive hearing it would be granted the above three orders as permanent injunctions is a relatively low one.

**Arguable case?**

*Clause 15*

[67] Clause 15 seeks to impose an ongoing obligation of confidentiality on Mr Selinger in relation to information acquired either "directly or indirectly as a result of" his employment with SBL. All such information is "deemed to be confidential and is to be treated in the strictest confidence", unless it is already publicly known.

[68] Mr Selinger argues that the clause is unclear, uncertain and unnecessarily wide. In particular, the clause seeks to make all information confidential because SBL deems it to be. It seeks to make *any* information related to SBL's "customers, franchises, associated companies or subcontractors" confidential and protected after Mr Selinger's employment ended.

[69] The common law on post-employment confidentiality only attaches to proprietary information, such as trade secrets and confidential information related to clients and their relationship with the former employer, to a limited extent.

[70] The English case of *Facenda Chicken Limited v Fowler4* has been relied on by the New Zealand courts to determine that only certain types of information are considered confidential after employment ends.

[71] SBL cannot deem all and any information acquired by Mr Selinger to be confidential just because he acquired it during his employment. The interpretation of clause 15 has to be undertaken in line with the law on confidentiality, otherwise the clause is too oppressive on Mr Selinger's right to earn a living after his employment with SBL ended. For example, it would prevent Mr Selinger using all knowledge, acquired at SBL, of the Australian regulatory regime on importing used cars into Japan, which could never be confidential information at common law.

[72] It is certainly arguable that in the event of a substantive hearing Mr Selinger may be found to have breached his duties of fidelity, loyalty and good faith by dealing with a current customer of SBL during his employment, that dealing not being for the

benefit of SBL.

4 [1985] 1 All ER 724

[73] There is also an arguable case that Mr Selinger passed on confidential information during his employment, by sending Mr Friend's email to TSI. Mr Selinger says that there was no confidential information contained in the email. He says that TSI already knew the components making up SBL's financial model for WSA. However, I consider SBL has an arguable case that at least the information about what profit SBL sought to make on each car purchased for WSA was confidential information that was covered by Mr Selinger's duties during his employment. That duty of confidentiality may also have attached to the agent's fees SBL paid to Sei-Shin or whatever other agents it used.

[74] The question is what kind of confidential information can genuinely be covered post-termination, under clause 15, when the common law already provides some protection to a former employer.

[75] There is insufficient evidence to establish definitively at this early stage that SBL's models and pricing fall into the camp of trade secrets. However, SBL has an arguable case that Mr Selinger had access to proprietary information of that nature as a sales executive, beyond what he already knew about how the industry operated, that he could use either in business for himself in competition with SBL or on behalf of another competitor.

[76] Even if clause 15 did not exist, the common law position on an ex-employee's continuing duty not to actively memorise or copy details of their employer's clients, in order to use those in direct competition with the employer, applies to Mr Selinger.

[77] Mr Selinger had long experience in exactly the same industry that he worked in for SBL. He came to SBL with a certain amount of knowledge and skill. He is entitled to use that knowledge and skill as well as any skill and knowledge of the industry he developed over his time with SBL to earn a living now that he has left SBL.

[78] There is no suggestion that he has taken away, or memorised, any list of clients and their contact details.

[79] There is an arguable case that Mr Selinger is prohibited from sharing any truly confidential information, perhaps such as SBL's pricing structures post-employment, even under common law.

[80] However, SBL's paramount concern is to protect its relationships with its customers, in particular, but not only, WSA. Those relationships are more specifically protected under the clause 17 restraint of trade provisions. I examine clause 17 below.

*Clause 16.5*

[81] Mr Selinger has acknowledged that he did, for a time, retain a yen chart that was a document related to SBL's business. He maintains that he has destroyed it now. SBL still seeks an injunction.

[82] Mr Selinger has not given an undertaking that he has returned and/or destroyed any documents and/or equipment belonging to SBL. There is an arguable case that SBL could enforce this clause.

[83] I will make an order that Mr Selinger must comply with clause 16.5 and return all documents and/or equipment belonging to SBL.

*Clause 17*

[84] I need to determine whether SBL has an arguable case that clause 17 would be upheld and a permanent injunction granted after the substantive investigation.

[85] There is a public interest in Mr Selinger being free to make a living in his chosen field, which is car importation, in particular, importing cars from Japan for sale to car retail dealers whether in New Zealand or any other part of the world.

[86] SBL asserts the restraint in Mr Selinger's activities for six months after his employment ended is reasonable and necessary to protect its business interests.

[87] SBL alleges that Mr Selinger has already interfered with its relationship with Sei-Shin, TSI and with WSA. For that reason, SBL argues that he should be restrained until 13 October 2017 from doing business on his own account or for any competitor with WSA, and any other SBL customer that did business with SBL in the

12 months leading up to 13 April 2017.

[88] It is arguable that TSI and Sei-Shin do not meet the usual, plain meaning of the word "customer". Instead, SBL is, or was, a customer of TSI and Sei-Shin. SBL paid them for providing services to it.

[89] Clause 17 states that it does not seek to stop Mr Selinger being employed by a competitor of SBL. That means Mr Selinger could be employed at another car importation business, so long as he did not do any of the things clause 17 prohibits.

*Adequate consideration for the restraint?*

[90] The Court of Appeal in *Fuel Espresso v Hsieh*5 held the principle that consideration must be given for a restraint of trade provision remained. However, it confirmed that the existence of consideration could be inferred from the contractual terms entered into at the beginning of an employment relationship.

[91] Mr Selinger began work on 9 April 2013. The parties signed the employment agreement on 10 April 2013.

[92] I have no evidence about when SBL gave the employment agreement to Mr Selinger, that is, whether it was provided to him in writing before or after the commencement of the employment relationship. I have no evidence about what, if any, discussions were held with Mr Selinger prior to commencing employment about the need for a restraining provision.

[93] Clause 17.2 of the employment agreement contains an acknowledgement that the remuneration under the agreement included "a component in recognition of this restraint."

[94] There is no suggestion that Mr Selinger entered into the restraint under duress.

[95] There is insufficient evidence for me at this interim stage to be fully satisfied that consideration for the restraint was made by an exchange of promises of employment, services undertaken and payments made.

[96] On its own, this does not lead me to conclude, at this interim stage, that the restraint is unenforceable. However, it is an aspect that I will have to explore at the substantive investigation.

*Significance of lack of amount of agreed damages in the Second Schedule?*

[97] Clause 17 states that in the event of any breach SBL would be compensated by

Mr Selinger by him paying the amount set out in the Second Schedule. There is no

such amount set out. It is arguable that this lack renders clause 17 void for uncertainty.

[98] On its own, this does not lead me to conclude, at this interim stage, that the restraint is unenforceable. However, it is an aspect that I will have to explore at the substantive investigation.

*Clause 17 only applies if the employee ends the employment relationship*

[99] The restraint of trade only applies when the employee ends his employment with SBL. Mr Selinger contends that he was constructively dismissed, so that, although he gave notice, SBL ended his employment with it. Therefore, Mr Selinger submits the restraint of trade is not enforceable.

[100] Apart from Mr Selinger's assertion in his affidavit that he resigned "due to the manner in which I had been treated by the applicant", I do not know what grounds he relies on to assert SBL constructively dismissed him.

[101] In these circumstances, I cannot be sufficiently sure that the ending of the employment relationship was at SBL's instigation. If Mr Selinger lodges a claim of unjustified constructive dismissal, I will hear that claim at the same time as the substantive claims by SBL.

[102] I do not hold the restraint of trade provision to be unenforceable simply on the basis that SBL ended the relationship, because that is not proved.

[103] It is arguable that if Mr Selinger ended the employment relationship the restraint of trade clause could apply, provided it is reasonable.

*Does SBL have a proprietary interest to be protected?*

[104] A restraint will only be enforceable to the extent that it is required to protect an employer's proprietary interest. The reasonableness of a restraint has to be assessed as at the date it was entered into.

[105] SBL submits it has "protectable interests" in the trade connections and confidential information that Mr Selinger was exposed to through his job. SBL says it

has developed and refined pricing models over many years, which amount to

5 [2007] NZCA 58; [2007] ERNZ 60 (CA)

confidential information that requires protection. In addition, it says it developed unique systems and processes to deal with Australian laws and regulations when importing vehicles into Australia.

[106] Mr Selinger disagrees that any information about pricing he was exposed to at SBL amounts to a unique model that could be classified as confidential information. He says SBL conducts its business in the same way as any other importing company he has worked for and that compliance costs, agent fees and shipping costs are very similar across the industry.

[107] The fact that such costs are similar throughout the industry does not mean that SBL's actual pricing structure cannot amount to confidential information. Instead, similar external costs across the industry may mean that it is more reasonable for an importer like SBL to keep its costs confidential as its margins are likely to be slim, and its profits constrained by competition in the industry.

[108] There is an arguable case that SBL has a proprietary interest in its pricing models, and that it has an interest in protecting its trade connections, with customers such as WSA.

*Reasonableness of the scope of the non-solicitation clause*

[109] Mr Selinger submits that clause 17 is too wide in its application and therefore, unreasonable and cannot be enforced.

[110] The wording of the clause makes it clear SBL seeks to stop Mr Selinger from dealing with customers that SBL provided services to in the previous 12 months. It applies even if Mr Selinger did not provide any services to those customers or have any contact with them during his employment. It is arguable that this is wider than it needs to be to protect SBL from Mr Selinger competing directly with it for the same custom.

[111] How is he to know who *all* of SBL's customers were in the preceding 12

months?

[112] The clause as drafted would also restrain Mr Selinger from dealing with customers who SBL provided financial services to, although Mr Selinger did not supply financial services on behalf of SBL, and restrain him from dealing with clients

other sales executives dealt with for car importation, even if he did not know during his employment which customers throughout New Zealand the other sales executives dealt with.

[113] The clause as written limits Mr Selinger's ability to deal with former customers of SBL, whose professional relationship with SBL ended any time in the 12 months prior to Mr Selinger's job ending. However, SBL could have no ongoing proprietary interest in a former customer, including those that stopped dealing with SBL in the previous 12 months. The clause is wider than it needs to be to protect SBL's legitimate trade connections and proprietary interests.

[114] Mr Selinger contends that WSA was a *former* customer of SBL. That is, he says that as far as he knew the board had decided it was not profitable enough to continue supplying vehicles to WSA. He says that if the restraint were enforced he would be unable to deal with WSA even though SBL decided not to continue supplying it with cars from Japan, and that is an unfairly wide restriction.

[115] There seems to be a conflict of evidence on that point. I note that whether SBL intended to keep dealing with WSA is a matter for evidence that I cannot resolve at this interim stage. However, in the abstract that point is a sound one. Why should a former employee not deal with a former customer that the employer decided not to supply, or a former customer that decided not to engage with SBL some months prior to the employee's employment ending?

[116] The last part of clause 17 seeks to restrain Mr Selinger from dealing with any holding company of SBL's current or

former customers, any subsidiary company of such a customer and any subsidiary company of any of the holding companies. The restraint is expressed to apply even if SBL has not dealt with the holding companies or subsidiary companies. That is a very broad restriction and one that would be very hard for Mr Selinger to comply with simply because of a lack of knowledge of customers' holding companies or subsidiaries. In addition, it goes beyond protecting SBL's proprietary interest or trade connections.

[117] Clause 17.1.1 to 17.1.4 does not prohibit Mr Selinger from supplying services or products not offered or provided by SBL "currently", which must mean at the end of his employment. This is a reasonable concession, that on the face of it would allow Mr Selinger, for example, to import used American cars and motor bikes for sale to

SBL's clients. However, clause 17.1.5 ("may not use your name or permit your name to be used to obtain the custom of...") is expressed far more broadly and may make the whole clause, as signed at the beginning of the employment relationship, unenforceable.

*Period of restraint*

[118] The six-month period of restraint is relatively long for the kind of work Mr Selinger undertook for SBL, which was purchase and supply of second-hand vehicles. However, it is arguable that a reasonable restraint for a six-month period could be upheld.

*Conclusion on arguable case*

[119] There is a barely arguable case that the Authority would issue a permanent injunction restraining Mr Selinger in line with clause 17.

**Where does the balance of convenience lie?**

[120] This test requires me to weigh up the respective hardships in the interim between this determination and a final determination, if the interim orders are granted.

[121] I also need to consider whether monetary remedies are an adequate remedy, instead of any interim injunction.

[122] Mr Selinger has now been out of work for almost 12 weeks, a considerable period of time. His evidence discloses that his modest savings are likely to be depleted by the end of this month. However, it is still likely Mr Selinger could pay a monetary remedy to SBL for any losses proved attributable to Mr Selinger's employment and/or prohibited post-employment behaviour, despite the difficulty in assessing and proving such losses. Mr Selinger has about $100,000 equity in his home and a reasonable amount in KiwiSaver. Although he is not wealthy, he has the ability to pay proved SBL losses.

[123] SBL is in a strong position to pay Mr Selinger if I decide to impose an interim injunction but do not find the restraint of trade clause enforceable after a substantive hearing.

[124] However, I am not convinced that monetary damages would be an entirely adequate remedy for Mr Selinger's effective inability to deal with any current or former SBL customers in his chosen field for six months. There is the obvious difficulty in proving how much he could have earned if he was able to set-up his own business over that time. Another consideration is the significant limitation on what Mr Selinger choses to do by way of work in his chosen industry.

[125] I consider the relative hardship of the restraint being upheld for six months is greater for Mr Selinger than that for SBL in it not being upheld at this stage, which is already 12 weeks, almost three months, after his employment ended. Mr Selinger is his family's main income earner with a mortgage to pay as well as the usual day-to- day family expenses.

[126] The likely realistic date for me to be able to make a substantive determination is also a factor I need to consider. It is unfortunate, but unavoidable, that a determination would not be likely to be issued until about mid-October, three and a half months from now and at almost exactly the date the restraint would expire, if it were enforceable.

[127] I also take into account that SBL discovered Mr Selinger's apparent breach of fidelity on 19 April, and although it tried to get an explanation from him, it took a little over a further five weeks to lodge these proceedings. That does not demonstrate urgency on SBL's part to protect its business from Mr Selinger's potential competition.

[128] I conclude that the relative inconvenience of granting the injunction is greater for Mr Selinger, than declining to grant it is for SBL. The balance of convenience favours Mr Selinger.

**Overall justice?**

[129] As a final test, I need to consider the overall justice of the case. I have concluded that there are some elements of an arguable case but that the balance of convenience favours Mr Selinger.

[130] In considering the overall justice, I take into account that SBL has now had 11 weeks since Mr Beirne found the email

meant for Mr Selinger on 19 April 2017. After confirming with TSI that Mr Selinger placed the order with Sei-Shin, Mr Beirne

made contact with Mr Fowler of WSA. However, he did "not confront him directly about whether he had purchased vehicles through Kyle", as he did not want to "upset the customer."

[131] Mr Beirne's evidence is that he told Mr Fowler that Mr Selinger had resigned and promised him the same level of service. Mr Fowler told him he would "not throw the baby out with the bath water". Mr Beirne took that to mean WSA may still do business with SBL. He relied on Mr Fowler to get back to SBL four weeks later. He says WSA has not been in touch and SBL has not received any orders since Mr Selinger's resignation.

[132] However, there is no evidence from Mr Beirne that SBL made any attempt to talk to Mr Fowler about sourcing and supplying the WSA order (for 15 or 30) vehicles he knew it had asked Mr Selinger about.

[133] I consider SBL has had a reasonable opportunity already, over the time from

19 April until the interim investigation on 19 June, to shore up its business relationship with customers Mr Selinger dealt with while employed.

**Conclusion and Orders**

[134] **Standing back and weighing all the elements in the balance, I consider the overall justice favours denying an interim injunction upholding clause 17.**

[135] **However, Kyle Selinger must delete any electronic documents or information originating from Simon Beirne Limited, including any copy of David Friend's email of 24 March 2017 or any yen charts that he retained after his employment ended on 13 April 2017, by 5 pm, Monday, 10 July 2017. He must return any physical copies of such information that he retains to Simon Beirne Limited by 5 pm, Monday, 10 July 2017.**

[136] **In addition, pursuant to post-employment obligations of confidentiality Mr Selinger must not refer to and use the SBL analysis undertaken by David Friend for his own benefit or that of any future employer of his.**

[137] The dates of 18 – 20 September 2017 remain for the investigation meeting to consider the other claims made by SBL, and Mr Selinger's personal grievance if he decides to lodge an application. However, I encourage the parties to seek to come to

an agreement in relation to all outstanding issues, and encourage the use of mediation again if it will assist.

**Costs**

[138] Costs are reserved. Mr Selinger has asked that they be dealt with at this interim point rather than waiting until the substantive matter has been determined. That is a reasonable request in all the circumstances.

[139] The parties should try to agree on costs. If that is not possible Mr Selinger may apply for costs at any time once 21 days after the date of this determination has passed. SBL may then have a further 21 days to respond.

Christine Hickey

Member of the Employment Relations Authority

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