

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 54
5312456

BETWEEN	WARREN SKERRETT INVESTMENTS LIMITED First Applicant
A N D	CAMELOT NEW ZEALAND LIMITED PARTNERSHIP Second Applicant
A N D	DONALD BROAD Respondent

Member of Authority:	Helen Doyle
Representatives:	Rob Towner and Elizabeth Coats, Counsel for Applicants Peter Churchman, Counsel for Respondent
Investigation meeting:	On the papers
Submissions Received:	31 January 2012 and 1 March 2013 from Applicants 20 February 2012 and 7 March 2013 from Respondent
Date of Determination:	13 March 2013

DETERMINATION OF THE AUTHORITY (No 6)

Employment relationship problem

[1] The applicants apply for confidentiality orders with respect to a sale and purchase agreement between the first and second applicants and Camelot NZ Management Limited dated 30 September 2009.

[2] A copy of the sale and purchase agreement was recently made available to the Authority and to Mr Churchman so that proper consideration could be given to it and what orders, if any, were required because of its nature.

The applicants' application and subsequent memorandum

[3] The applicants lodged an additional memorandum to its earlier application as to confidentiality of evidence dated 31 January 2012, following a recent telephone conference with the Authority and counsel.

[4] The applicants propose in the latest memorandum that only section 3.1, Schedule 1, Schedule 2 and Schedule 4 remain confidential to the Authority and counsel and not be published whereas previously any order sought was to apply to the entire sale and purchase agreement. The applicants propose that the rest of the sale and purchase agreement can be disclosed to the respondent but that the Authority makes orders in relation to those parts of the agreement. These are that the respondent may not take copies of the agreement and will not be entitled to discuss the contents of the document with any other person aside from counsel. That the respondent is not to use the sale and purchase agreement for any purpose other than the proceeding and that no person other than the Authority Member, respondent and counsel for the respondent is to view the sale and purchase agreement.

[5] Ms Coats noted in her memorandum that the orders sought, with the exception of the third order, were consistent with the undertaking volunteered by counsel for the respondent in the submissions of counsel.

The respondent's submissions

[6] Mr Churchman submits that the memorandum provided on behalf of the applicants sought extraordinarily broad and unusual confidentiality orders whilst noting that the original orders sought were even broader. Mr Churchman submitted that on review of the document, any justification for extraordinary orders shows that the initial claims in the application were "*completely fallacious*". Mr Churchman submitted there was nothing unusual about the form or content of the agreement and that it was in the standard format for sale and purchase of a small business.

[7] Mr Churchman submits that the sections of the document that the applicants seek to have kept confidential relate to the price paid for the business and that given that those sums refer to a transaction that occurred some years ago it is doubtful that it could be said that there is any genuine commercial sensitivity in the amount paid for the business. Mr Churchman submits that even if there is, all that is required is a standard order saying that those parts of the document referred to in para.3 of the

applicants' counsel's memorandum of 1 March 2013 are to remain confidential to the respondent and his legal advisers.

[8] Mr Churchman submits there is no reason why the respondent should not know what was paid for the business in circumstances where the parties to the agreement are suing him for the very substantial losses they claim resulted from breach of his contractual obligations to them. He further submits that the further orders are unnecessary and a slur on the integrity of the respondent's legal advisers.

[9] Mr Churchman submits there is no suggestion that the respondent would disregard the obligations in the discovery process to only use material discovered for the purpose of the proceeding in which it is obtained. He further submits there is no basis for an implication that the respondent's legal advisers will, unless restrained by order of the Authority, breach their obligations. Mr Churchman does not accept that the orders sought are consistent with the undertaking volunteered by counsel in submissions dated 9 February 2012. He submits that all that was said was an acknowledgment that the respondent's legal advisers and the respondent had an obligation not to use the document for any purpose other than the proceedings and were happy to give such an undertaking. He submits that is "*vastly different to what is sought in paras.5 (a) and (c) of the applicants' memorandum*".

[10] Mr Churchman submits that a sensible practical solution to the matter is that the Authority direct that those parts of the document referred to in para.3 of the memorandum of the applicants' counsel dated 1 March 2013 be redacted from the copies of the document produced in evidence in the Authority. Mr Churchman asks that costs in relation to the application for confidentiality be reserved and submits that it was completely unnecessary and that the claims made about the nature of the agreement in the 31 January 2012 application have now been revealed to be without foundation.

Determination

[11] There are two matters that I have primarily had regard to with respect to any confidentiality orders about the sale and purchase agreement. In doing so I have taken into account the role of the Authority and the object of Part 10 of the Employment Relations Act 2000, section 143 (f), that recognises judicial intervention at the lowest

level should not be inhibited by strict procedural requirements. A practical common sense approach is called for.

[12] The first matter I have had regard to is whether there is any commercial sensitivity about the purchase price in the sale and purchase agreement. The second matter that I have had regard to is whether the purchase price details set out in s. 3.1 and schedules 1, 2 and 4 are relevant to the claim in front of the Authority.

[13] Even though the sale and purchase agreement is approximately 3½ years old I accept there is some commercial sensitivity about the purchase price as set out in clause 3.1 and schedule 1, schedule 2 and schedule 4. I am not satisfied that the balance of the agreement would justify any confidentiality orders. It is a standard sale and purchase agreement for a business. Having found some commercial sensitivity around the purchase price I also conclude on the material in front of me that it appears highly unlikely that the purchase price for the business is relevant to the issues of damages or loss that are before the Authority.

[14] There will be rare occasions where the Authority will limit disclosure of material to a representative only. The Authority would have been reluctant to make such an order had it considered the purchase price was relevant to the proceedings but it does not. Other parts of the sale and purchase agreement that are clearly relevant are not proposed to be withheld from the respondent.

[15] Balancing the interests of both parties in circumstances where there is commercial sensitivity about the purchase price of the business and the purchase price of the business appears irrelevant to the proceedings then section 3.1, schedule 1, schedule 2 and schedule 4 are to remain confidential to the Authority and counsel/legal advisers and should be redacted from the sale and purchase agreement to be disclosed to the respondent and in evidence. I so order. I further record as it appears unlikely to be relevant the Authority would not need to publish in its determination details of the purchase price. Leave is reserved though for Mr Churchman to return to the Authority if on preparation for the investigation meeting he considers the purchase price set out in the sale and purchase agreement is relevant to the question of damages or loss before the Authority. The Authority will then after hearing from counsel for the applicants' reconsider its confidentiality order.

[16] No further orders are required. The respondent is clearly aware through his counsel of the obligation to use material obtained by a discovery process only for the purpose of the proceeding in which it was obtained.

Costs

[17] Costs are reserved.

Helen Doyle
Member of the Employment Relations Authority