

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 5  
EMPC 469/2023**

IN THE MATTER OF      an application for a search and ancillary  
orders

BETWEEN                MGE NEW ZEALAND 2010 LIMITED  
Applicant

AND                        MCKAY LIMITED  
Second Applicant

AND                        JAMES LIMERICK CAMPBELL  
First Respondent

AND                        JAYCEE ELECTRIX LIMITED  
Second Respondent

Hearing:                18 January 2024  
(Heard at Auckland by telephone)

Appearances:        D Grindle, counsel for applicants  
No appearance for respondents

Judgment:            19 January 2024

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**JUDGMENT OF JUDGE M S KING**

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**Introduction**

[1] MGE New Zealand 2010 Ltd and McKay Ltd have applied without notice for search orders against Mr James Campbell, a former employee of the applicants, and JayCee Electrix Ltd (JEL), a company incorporated by Mr Campbell.

[2] The orders sought relate to a search of the premises of JEL, which are thought to hold electronic information copied or taken from the applicants; and evidence of

activities which allegedly breach the obligations Mr Campbell owed to the applicants as an employee.

[3] The application is supported by comprehensive affidavits from Mr Edward Ashby, on behalf of the applicants; affidavits from the private investigator and a forensic technology and cyber security expert; a proposed statement of problem; undertakings from the applicants; memoranda from counsel, Mr Grindle; as well as a draft order. I held two telephone directions conferences with counsel to check the proposed terms of the order, and to deal with topics which became the subject of a supplementary memorandum from counsel and an amended application, order and further affidavit evidence from the applicants. I will refer to these issues later.

### **Background**

[4] MGE New Zealand 2010 Ltd (MGE) is a subsidiary company of McKay Ltd (McKay), and principally offers switchboard engineering and manufacturing services.

[5] On 1 July 2008, Mr Campbell was employed by McKay as their acting manager switchboards. In this role Mr Campbell was responsible for managing the switchboard building and componentry side of McKay's business. On 16 July 2010, MGE was incorporated by McKay to take control of the switchboard engineering side of McKay's business. On 27 May 2013, Mr Campbell's employment was transferred to MGE. Mr Campbell's role at MGE was the Whangārei workshop manager, and it entailed similar duties to those performed in his previous role with McKay, with the primary focus on developing and managing MGE's switchboard building business. During the course of his employment Mr Campbell was privy to a range of intellectual property and confidential information belonging to the applicants, including client lists, quoting calculations and technical documents relating to the work the applicants undertook in respect of the construction and engineering of switchboards and related componentry.

[6] On 5 June 2020, while still employed by MGE, Mr Campbell incorporated JEL, a company in which he is the sole director and a majority shareholder. JEL operates from premises situated at 269 Port Road, Whangārei.

[7] On 16 June 2020, Mr Campbell gave notice of his resignation of employment from MGE. Mr Campbell informed MGE that he intended to start working for his own company, JEL, which would undertake domestic and light industrial commercial work and would not be in competition with the applicants.

[8] On 13 July 2020, JEL entered into an agreement for the provision of services with MGE to provide electrical maintenance services. The purpose of this engagement was to allow Mr Campbell to provide ancillary and managerial support to MGE on projects which he had previously worked on as an employee, until the completion of these projects. The last invoice JEL issued MGE pursuant to this contract was dated 8 June 2021.

[9] On 27 January 2021, JEL entered into a similar contract with McKay. Under this contract JEL provided maintenance and installation services on a variety of general electrical projects for McKay. The last invoice JEL issued to McKay pursuant to this contract was dated 26 March 2021.

[10] Mr Campbell, through JEL, continued to have access to his old MGE email address to allow him to carry out his contracting duties for the applicants.

[11] In July 2021, MGE became aware through changes to Mr Campbell/JEL's LinkedIn profile that, despite Mr Campbell's assurances he had commenced manufacturing, engineering and installing switchboards in competition with MGE. MGE recognised that this was outside the restraint of trade period provided in Mr Campbell's individual employment agreement (IEA) with MGE, and it did not take any action in relation to this.

[12] In March 2023, MGE was invited to submit a quote to a long-standing client. MGE subsequently became aware that JEL had won the contract. MGE understood that this was JEL's first quote for an electrical control panel of this magnitude and it had concerns about how JEL would be able to adequately price that job. MGE became concerned that Mr Campbell may have used its intellectual property and confidential information to win the contract.

[13] On 3 April 2023, MGE acquired the documents submitted by JEL for the contract. The documents appeared to be an exact replica of the documents designed and used by MGE for quoting contracts. MGE engaged a forensic technology and cyber security expert to undertake an analysis of the applicants' computer records with an aim to forensically examine data and mailboxes for suspicious activity.

[14] In summary, the expert discovered four emails of concern. The emails attached MGE confidential information and intellectual property. The details of these emails are set out below:

- (a) On an undisclosed date an email was prepared by Mr Campbell for sending to his JEL email address which contained two documents. MGE submits the set up and design of the documents attached to this email have subsequently been adopted by JEL in its work.
- (b) An email sent on 24 June 2020 from Mr Campbell to his JEL email address. This email was forwarded about three weeks prior to Mr Campbell resigning from his employment with MGE. The email attached a price file which contained more than 63,000 rows of pricing data that had been provided by an MGE client in respect of switchboard systems and componentry. The price file contained price information and is confidential information belonging to MGE and its client. MGE says that in his legitimate role with MGE Mr Campbell had no reason to use this information. However, the information would have been useful to Mr Campbell when setting up his own business.
- (c) An email sent on 13 November 2020 to Mr Campbell's JEL email address. This email contained a Word document with the title "MGE Switchboards Specification – For Tender rev 1.0.doc".
- (d) An email sent on 12 February 2021 to Mr Campbell's JEL email address. The email attached a pdf document of electrical schematics for a MGE client.

[15] The applicants accept that the emails dated 13 November 2020 and 12 February 2021 were sent after Mr Campbell ceased employment. However, they say that those emails appear to be a continuation of what Mr Campbell did with the earlier documents that he had emailed JEL and are evidence of his dishonest intent.

[16] MGE does not consider there is any real likelihood of Mr Campbell sending these emails for a legitimate and lawful purpose. It says Mr Campbell was not involved in pricing work and had no reason to have the pricing data document sent on 24 June 2020 in his control. MGE does not have any recollection of Mr Campbell working on any matters that would require any of the above documents set out in at [14] above to be sent to Mr Campbell's JEL email address. It considers the more likely reason for doing so is that Mr Campbell wanted these documents to assist in his new business venture.

[17] To gather further information, MGE engaged a private investigator to run a covert operation to collect information. This involved the investigator setting up a fictitious company purporting to seek a quote for a switchboard designed by JEL. This included a request that JEL provide with its quote a general arrangement drawing and single-line diagram of the proposed switchboard configuration.

[18] After receiving the quote documents from JEL, the forensic technology and cyber security expert undertook a comparative analysis of the documents received from JEL and the template quoting documents provided by MGE. The expert determined:

- (a) when analysing the general test documents provided by JEL against the documents provided by MGE it was determined that both documents were created on 26 July 2002 at 4.29 pm;
- (b) the formatting, formulas and content within the JEL document were either exactly the same or very similar to MGE's general test documents; and

- (c) the analysis of the CAD drawings recorded that both documents contained data that identify McKay and an engineer named Mike Millet who was involved in completing these forms while he was employed by MGE in the creation of the documents.

[19] The forensic technology and cyber security expert stated that, in his opinion, the documents from JEL are either wholly or partially sourced from MGE.

[20] This led the applicants to believe that Mr Campbell and JEL are utilising their pricing information and the processes that are embedded in its Excel spreadsheets and quoting documentation.

### **Proposed proceeding**

[21] The applicants have drawn the conclusion that various obligations in Mr Campbell's IEAs have been breached. This includes those which applied up to the date when his employment ended and those which have applied since. They also believe that JEL is aiding and abetting Mr Campbell in those breaches, and has assisted him to mislead and deceive the applicants. The applicants intend to file a statement of problem with the Employment Relations Authority as soon as the search order has been executed, seeking a range of remedies under the Employment Relations Act 2000 (the Act).

[22] The applicants believe that both respondents have property (information and property) belonging to them and other evidentiary material relevant to the intended Authority proceeding. Thus, it considers a search order is necessary to secure and/or preserve evidence for that proceeding.

[23] They say a number of false and/or misleading assurances have been given by Mr Campbell. Further they believe that, given the history referred to earlier, if notice of an application for a search order was to be given to Mr Campbell or JEL, it is likely goods and/or information would be concealed.

## Legal framework

[24] The principles applicable to a without notice application for a search order are well established. The Court has jurisdiction to make search orders under s 190(3) of the Act and by applying pt 33 of the High Court Rules 2016. Item eight of the Court's Practice Directions confirms the necessary prerequisites for the granting of a search order.<sup>1</sup>

[25] A search order is a draconian tool because it is one which is generally made without notice, with potentially significant consequences. Moreover, a breach of a search order may amount to contempt.

[26] Consequently, pt 33 of the High Court Rules requires compliance with a broad range of provisions, including as to the making of an order only in particular circumstances. Comprehensive undertakings as to implementation must be given by the applicant, including as to damages. An independent solicitor must supervise the execution of the order. A mandatory review is to be undertaken by the Court after the order has been executed. By these means, the Court maintains oversight of the process. At the commencement of the process, particular care must be taken to ensure an applicant has complied with and can satisfy all necessary requirements.

[27] An applicant for such an order must establish a strong prima facie case on an accrued cause of action; that potential or actual loss or damage to the applicant would be serious if a search order was not made; and that there is sufficient evidence in relation to a respondent to show that the respondent possesses relevant evidentiary material, and that there is a real possibility that the respondent might destroy such material, or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding.<sup>2</sup>

[28] I now deal with each of those requirements.

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<sup>1</sup> "Employment Court of New Zealand Practice Directions" <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 8.

<sup>2</sup> High Court Rules 2016, r 33.3.

*Strong prima facie case*

[29] It is asserted that there has been a breach of the following provisions of Mr Campbell's IEA:

- (a) Confidentiality clause.
- (b) Post-employment obligations.
- (c) A conflict-of-interest clause.
- (d) An intellectual interest clause.
- (e) Company and client property clause which required Mr Campbell to return anything belonging to the companies or its clients when his employment ended.

[30] The applicants allege that Mr Campbell, as a trusted employee, had access to intellectual property and confidential information which would be valuable to a competitor. Had Mr Campbell disclosed at the outset that he was resigning and establishing a switchboard manufacturing business, the applicants would not have engaged JEL to undertake contract work for them and would not have allowed Mr Campbell to retain access to its databases and email system. The applicants say that they relied on the clear and unequivocal assurances made by Mr Campbell and genuinely believed that JEL would provide ancillary services to them, and this would benefit both businesses. The applicants now hold the view that Mr Campbell and JEL have for some years been utilising their confidential information and intellectual property. This includes utilising pricing information and the processes that are embedded in its Excel spreadsheets and quoting documentation. Given that Mr Campbell was willing to do this, the applicants have no confidence in his compliance with a Court order and disclosure processes. Their evidence is that, if this matter were to proceed on notice, the applicants expect they will never know the true extent to which Mr Campbell was in breach of his employment obligations.

[31] The evidence before the Court is that, of the four emails MGE has found of concern, at least one email was sent during Mr Campbell's employment with MGE.<sup>3</sup> In addition, the duty on an employee not to use confidential information persists past the termination of employment (depending on the nature of the information). The Court accepts that two of the four emails were sent while Mr Campbell was a contractor of MGE or McKay. However, given the background to this matter, the Court is satisfied that the applicants' cause of action arises from Mr Campbell's employment obligations which were entered into during the employment relationship and in the work context. On this basis the cause of action falls within the employment jurisdiction.<sup>4</sup>

[32] I am also satisfied that the comprehensive affidavit evidence which has been filed establishes a strong prima facie case that Mr Campbell has breached his obligations to his former employers, both during and after his employment, by breach of his IEA and by breach of his duty of good faith under the Act.

[33] Further, there is a strong prima facie case that JEL has incited, instigated, aided or abetted Mr Campbell's breaches.

*Serious or potential loss of damage*

[34] It is submitted for the applicants that there would be a potential serious loss or damage were a search order not to be made.

[35] It is contended that the applicants have a well-established and viable business. MGE's market share in this industry has been built up since 2010, largely on the goodwill and the reputation of its parent company McKay, which started in Northland in 1936. The business of the applicants has been established through decades spent working in Northland and the substantial financial investment in business operations, research and development. Mr Campbell had extensive knowledge of the applicants' confidential information and intellectual property. It is also argued that there is sufficient evidence to suggest Mr Campbell has taken their property, being documents

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<sup>3</sup> See [14](b).

<sup>4</sup> *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740.

containing confidential information around pricing and formulas, which he is using for competitive purposes. It is asserted that this has a potential to cause serious harm to the applicants, the full extent of which they may not be able to prove without a search order.

[36] In particular, it is contended that template documents, pricing information and diagrams belonging to the applicants are likely possessed by Mr Campbell and JEL, which would provide a significant springboard for JEL's new business.

[37] It has been submitted to the Court that harm to the applicants' business includes the diversion of business away from their companies, the erosion and loss of competitive advantage, custom, income and profits, damage to goodwill and its reputation when its services are undercut by JEL. It is also contended that MGE's annual revenue has been adversely affected. MGE asserts that at least two long-standing clients have been lost or are in the process of being lost by MGE to JEL. MGE has estimated a gross profit loss in excess of \$110,000 a year due to the loss of these two clients.

[38] Lastly, the applicants submit that the search order is necessary to secure or preserve evidence which may be necessary to establish the applicants' causes of action against the respondents, in particular to understand the nature and extent of the alleged breaches.

[39] For prima facie purposes I accept these submissions and find that this aspect of the necessary criteria for making of an order is established.

*Evidence of evidentiary material held by the respondents*

[40] A clear inference may be drawn from the material placed before the Court that there is further information held by the respondents which would be relevant to the applicants' intended claims.

[41] The applicants point to the emails sent while Mr Campbell was employed by MGE and while he was a contractor for the applicants where it says he sent confidential information and intellectual property to his JEL email address without

any legitimate or lawful purpose. The applicants also point to the use of its documents or very similar documents by the respondents to obtain work. The applicants highlight several statements made by Mr Campbell before and after his resignation that he would not compete with them. It says these statements were plainly misleading. I accept that, on the basis of the information provided before the Court and the inferences which are drawn, there is sufficient evidence that the respondents have in their possession further evidential material relevant to the applicants' intended claim.

*Possibility of evidence being destroyed/unavailable*

[42] It is submitted that there is a real risk information may not survive or be disclosed in the absence of an order because Mr Campbell has previously provided false or misleading assurances to the applicants about his intentions. On the basis of the evidence placed before the Court, including Mr Campbell sending documents during his employment and post-employment without any legitimate or lawful purpose and continuing to use these documents for his own benefit and the benefit of JEL. I accordingly accept the applicants' submission on this point.

*Overall justice*

[43] In his supporting affidavits, Mr Ashby, General Manager of MGE, has set out possible defences which may exist. First, it may be possible to raise denials about some aspects of the applicants' claims. Second, it may be possible to assert that the IEA obligations were unreasonable. However, I do not consider these possibilities render it inappropriate to make a search order. Mr Ashby has also confirmed he has made full and frank disclosure of all relevant material. He has conducted inquiries with a forensic technology and cyber security expert, and a private investigator.

[44] The Court is cognisant that Mr Campbell concluded his employment with MGE on 14 July 2020 and the search application has been brought more than two and a half years later. However, the evidence provided is that the damage from the alleged breaches may be ongoing and the search order would ensure that the applicants can find the documents that were taken (if any) so that they can establish their cause of action and the extent of their losses.

[45] The order sought would not result in any of the respondents' property being destroyed. Although they provide for removal of devices from JEL and Mr Campbell's premises, the Court is assured those devices will be returned as soon as they are cloned or relevant information has been copied from them.

[46] The application has been amended following a directions conference. The original application filed with the Court to search the premises at 269 Port Road, Whangārei, named Mr Campbell as the sole respondent to the proceedings. The evidence provides that the premises are located in an industrial part of Whangārei city and are the place from where JEL operates its company workshop. The premises do not appear to be Mr Campbell's personal residence, instead they appear to be used by JEL for business purposes, being its workshop and address for service with the New Zealand Companies Office. The Court queried whether issuing a search order for JEL's business premises without including JEL as a party to the proceeding would ignore the corporate veil between Mr Campbell and JEL, and would infringe on JEL's rights without giving it any right to be heard in the proceeding.

[47] The applicants' submission was that Mr Campbell and JEL are indistinguishable. The applicants pointed to the fact of JEL being formed on the basis of Mr Campbell's name and argued that Mr Campbell is the mind and soul of JEL. After holding a telephone directions conference to explore this issue and the scope of the search order sought, the applicants amended the application to include JEL as a respondent to the application and to narrow the scope of the order. JEL was added on the basis that Mr Campbell enabled JEL to use the applicants' confidential information and intellectual property, and JEL has aided and abetted Mr Campbell in doing so. Given the above, the Court is satisfied that it is fair and appropriate that JEL is named as a respondent to the proceedings and has the ability to be heard in the proceedings.

[48] I acknowledge that search orders are far-reaching and that there must be some proportionality between the perceived threat to an applicant and the consequences to the respondents of such orders being executed.<sup>5</sup> I am satisfied that in this case, the orders in the form which I am now approving are the only reasonable option for

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<sup>5</sup> See for example *Colombia Pictures Industry Inc v Robinson* [1986] 3 WLR 542 (Ch).

securing the information and property that the applicants allege belong to it. Accordingly, pt 33 of the High Court Rules is satisfied, and I make a search order as sought.

*Other considerations*

[49] Appropriate undertakings have been given. Financial evidence has been provided which suggests the applicants would be able to pay any order for damages against it, if made.

[50] A copy of this judgment, the draft statement of problem, the affidavits, the application for an order, counsel's memoranda and undertakings are to be served on each respondent, along with the sealed search order, immediately before the execution of the search order commences.

[51] The statement of problem is then to be finalised and to be filed with the Authority as soon as possible thereafter.

[52] A third-party electrical business, Marine & Industrial Electrics Limited, also operates from the premises. For the avoidance of doubt, the search order is limited to a search of the respondents' property on the premises and does not extend to a search of the property of the third-party electrical business.

[53] The judgment is not to be published other than to the parties, their representatives, and to the authorised persons who are to execute the search order, until further direction from the Court. I make an order that the Court file is not to be searched without leave of a Judge. If anyone seeks access to it, the parties are to be given notice of the application so they can be heard before it is dealt with.

[54] The applicants' intention to execute the search orders on a business working day on or before 19 January 2024. On that basis, at **10 am on 9 February 2024**, the Court at Auckland will consider the report from the independent solicitor which is to be filed and served by **4 pm on 7 February 2024**. Memoranda seeking directions from any party intending to appear at the review hearing are to be filed and served by

the same time and date. At the date of review, the applicants, the respondents and the independent solicitor will be heard.

[55] In the meantime, leave is reserved for any party to apply to the Court on 24 hours' notice to vary or discharge the orders made in this judgment.

[56] Costs are reserved.

M S King  
Judge

Judgment signed at 10.30 am on 19 January 2024