

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 46/08
File Number 5121520

BETWEEN 24 CARROT LIMITED
 Applicant

AND ZHEN YE-QING First
 Respondent and CAPITAL
 PRODUCE LIMITED
 Second Respondent

Member of Authority: P R Stapp

Representatives: Peter Cullen and Rachel Burt for the Applicant
 Alan Knowsley and Jenny Graham for the Respondents

Investigation Meeting: 18 April 2008 at Wellington

Determination: 19 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application for interim orders and interim compliance orders from the applicant. The applicant has alleged that Mr Ye-Qing has unlawfully obtained information that is confidential to 24 Carrot Limited and has breached restrictive covenants and confidentiality covenants contained in an individual employment agreement between the parties. It is alleged that the respondents' conduct is causing the applicant potential losses in revenue and profit.

[2] Mr Ye-Qing was employed by 24 Carrot Limited until 18 March 2008. Capital Produce Limited was set up as a competitive company on 27 February 2008. Mr Ye-Qing and Mr Alastair Lang are directors of that company (CPL). It is alleged Mr Ye-Qing has been directly contacting the applicant's clients and using the applicant's confidential pricing strategies and customer lists to entice those clients, aided and abetted by CPL. He denied enticing the applicant's clients or customers.

[3] The Respondents' have denied the allegations and provided their explanations on some of the matters raised by the Applicant. Mr Ye-Qing denied signing a draft employment agreement that he accepted he received but can not now find. CPL denied aiding and abetting any breaches involving Mr Ye-Qing.

[4] During the course of today's investigation meeting the parties discussed terms for undertakings and reached consent on terms to apply until the outcome of the Authority's substantive investigation meeting to be held on 29 April 2008. But they disagreed on two fundamental points that are about including five businesses that have gone from 24 Carrot Limited to be supplied by CPL.

Position Reached by the Parties in the Authority's Investigation Meeting

[5] The position the parties have reached include some matters they are able to consent to but differences remain on the extent of any orders that should be made and these have been highlighted in the square brackets with the source:

[1] *"The First and Second Respondents are restrained from [trading with-Applicant's position], soliciting or endeavouring to entice away from the Applicant or any person or organisation who was a client or customer of the Applicant during the time of the First Respondent's employment with the Applicant [or who became a client or customer of the Applicant after the termination of the First Respondent's employment-Applicant's position]. [With the exception of the five named parties, whereupon [4] below becomes unnecessary-Respondents' position]"*

[2] *"The First and Second Respondents are required to return forthwith all documents and electronic data and any computer which belong to the Applicant and are in the possession or under the control of the First and or Second Respondent. This includes all copies of the documentation and data described which shall also be delivered to the Applicant forthwith."*

[3] *"The Second Respondent is to allow an independent Information Technology expert appointed by the Applicant to check that the Applicant's information and software was ever on, and if so has been removed from the First and Second Respondents' computers and software. The expert will be organised from a reputable firm of forensic experts. It is agreed the expert's report is to be given to each party and the Authority simultaneously and that the expert will conduct his/her examination without disrupting the Second Respondent's business. Such arrangements will be organised by all parties' solicitors."*

[4] [The First and Second Respondents are to cease all business [and not commence business with customers or clients who were or are customers of the Applicant-Applicant]]

The Brief Facts

[6] 24 Carrot Limited is a fresh fruit and vegetable supply delivery business. The company operates within the greater Wellington area. Mr Ye-Qing was employed by 24 Carrot Limited from 11 September 2006 until 18 March 2008 as the company's operation manager.

[7] Capital Produce Limited was formed and registered as a company on 27 February 2008 and has two directors. These directors are Mr Ye-Qing and Mr Alastair Lang, both of whom are also shareholders.

[8] The standard individual employment agreement issued by 24 Carrot Limited makes provision for the following:

Clause 29 Confidential Information

29.1 *The Employee undertakes not to disclose to any person, or make use of, any information or material regarding personal details of any other employee that has been obtained during the course of their employment with the Employer.*

29.2 *The Employee shall not remove or copy any confidential, or commercially sensitive and commercially valuable information, including client/customer information, from the Employer's premises without the prior written consent of the Employer.*

29.3 *The restrictions contained in clauses 29.1 and 29.2 do not apply to;*
 29.3.1 *the use or disclosure of such information in the normal course of the Employee's duties; and*

29.3.2 *information which has already become public knowledge other than as a result of a breach of this clause by the Employee*

29.4 *The restrictions contained in the first two clauses under this heading apply both during the term of this agreement and after the expiry of the agreement.*

29.5 *The Employee shall not at any time or for any reason, whether during the term of this agreement or after its termination, use or disclose to any person any confidential information relating to information, or trade secrets of the Employer except so far as may be reasonably necessary to enable the Employee to fulfil their obligations under this agreement.*

29.6 *The Employee shall not disclose any confidential information who is not authorised to receive it.*

29.7 *The Employee shall not use any confidential information relating to the Employer's business, or information gained through the employment, to their own benefit, as distinct from the benefit of the Employer*

29.8 *The Employee shall not use or attempt to use any confidential information in any manner, which may injure or cause loss whether directly or indirectly to the Employer*

29.9 *During the course of employment or after termination of employment with the Employer, the Employee shall not directly or indirectly make a record of or divulge, or communicate to any other person, any information regarding the Employer's business, or any matters associated with the Employer. When requested, the Employee hereby agrees to sign a Statutory Declaration stating they are collecting commercially sensitive and valuable information only to perform the tasks required by the Employer and that the commercially sensitive and valuable information will not be passed to others during and after the term of employment. The Employee also irrevocably agrees to sign a Statutory Declaration stating they have returned all copies, in any and every form, of all commercially sensitive and valuable information on the termination of employment with the Employer.*

Clause 15.7 [Employee Obligations]

...The employee must declare any interest in any business of any kind for which the employee may potentially be in conflict or in competition with the business of the employer. Further the employee may not, whilst in the employ of the employer, invest personal money, obtain an interest in or establish any other business that may be deemed to be in competition with the employer or its principals without the written permission of the employer.

Clause 40 – Non-solicitation

The employee shall not at any time during the period of employment or for a period of one year after termination of employment, for whatever reason, either on the Employee's own account or for any other person, firm, organisation or company, solicit, endeavour to entice away from or discourage from being employed by the Employer, and any other Employee or actual client/customer or protective client/customer of the Employer.

Clause 41 – Restraint of Trade

The Employee shall not at any time during the term of this agreement and for a period of twelve (12) months after the termination of employment with the Employer establish, purchase, or obtain an interest in, either directly or indirectly any business in relation to anyway to the Employer within a radius of twenty (20) kilometres, without the express written consent of the Employer, provided that such consent shall not be unreasonably withheld.

SCHEDULE 3

Employment Agreement Schedule – Covenant of Employee

I, Zhen Ye-Qing covenant with 24 Carrot Limited in consideration of the agreement by 24 Carrot Limited to enter into a contract of employment with me (which contract shall, after execution of this covenant, be concluded), that I shall not during my employment by 24 Carrot Limited or thereafter use, divulge or communicate to any person any of the know-how in the business of 24 Carrot Limited, all of which I acknowledge to be confidential information, including without limitation any such information concerning the practice, dealings, transactions or affairs of 24 Carrot Limited which I may acquire pursuant to the performance of my responsibilities as an employee of 24 Carrot Limited.

For the avoidance of doubt I confirm that this covenant is given by me for the benefit of and shall be enforceable by 24 Carrot Limited.

[9] Mr Ye-Qing resigned his employment with 24 Carrot Limited on 27 February 2008. His final day of employment with 24 Carrot Limited was 18 March 2008. Mr Hansen says that he was told by Mr Ye-Qing that he was resigning because he was going to China to get married. Mr Ye-Qing's resignation read as follows:

It is with great regret that I wish to advise you of the termination of my employment from the 18th of March being my final day of work. This has not been an easy decision for me but I have reached the point in life where I must go out and try new business opportunities with my full commitment.

I'd like to take this opportunity to thank you for the employment and friendship you have given and shown me over the last 18 months.

All that I ask for from you is your blessing in this new venture, as it is something I am passionate about and have wanted to do for a long time.

*Kind regards,
Zhen Ye-Qing*

Determination

[10] There is no argument on the law and the legal tests applying.

[11] I am acting on the presumption that the Applicant will be able to prove its case. I have received affidavits from Mr William Hansen, company director of 24 Carrot Limited, Ms Helen Bartlett, housewife, Roberta Bennett, office manager of the Applicant, Mr Zhen Ye Qing, company director of Capital Produce Limited and Mr Alastair Lang, company director of Capital Produce Limited.

[12] There are central credibility differences between these two groups. Primarily the first credibility issue has to do with whether or not Mr Ye-Qing signed a draft employment agreement. This is followed by differences over whether or not Mr Ye-Qing has a laptop owned by 24 Carrot Limited, whether or not Mr Ye-Qing and Capital Produce Limited have pursued 24 Carrot Limited's clients, used information including client lists and pricing belonging to 24 Carrot Limited; and there are differences over what is happening with some clients and suppliers common to all parties. There are in particular five clients referred to in the affidavits that the Second respondent may be trading with and whom Messrs Lang and Ye-Qing may have had contact with in regard to doing business with them. My consideration of any orders and the extent of any orders, including the Respondents' continued relationship with those businesses, must be considered in light of the following.

[13] I am satisfied that there is an arguable case given the credibility differences between these groups on the above issues. If the employment agreement was signed as claimed by 24 Carrot Limited witnesses, where I note that Mr Ye-Qing has denied signing it, there will be a potential argument over the lawfulness of the Restraint of Trade clause that is purportedly part of 24 Carrot Limited's and Mr Ye-Qing's purported terms. There will also be credibility issues on the matters referred to above including, whether or not Mr Ye-Qing took a laptop from 24 Carrot Limited's office, the resolution of the differences the witnesses have deposed over the employment agreement, their involvement with people from the five businesses and the enforcement of the confidentiality, restraint of trade and non solicitation clauses if they apply. Thus, I find there is an arguable case.

[14] Alternative remedies could involve damages, but the immediate danger of the potential loss of business and goodwill may be unrecoverable, difficult to assess and irreparable to the Applicant, without some form of early intervention. The Applicant has provided an undertaking for damages and undertaken to act as a personal guarantor for the applicant as it relates to the undertaking for damages dated 14 April 2008. The Respondents say that damages would be sufficient to cover any proved claims especially considering that the substantive investigation meeting will be heard on 29 April 2008. However, the position of the Respondents meeting any damages is not clear in respect of any breaches that have been claimed. Also there is evidence of some profit being received by the Second Respondent from previous customers of 24 Carrot Limited that has been quantified, albeit the amount is small. I find that damages will not be a sufficient remedy when 24 Carrot Limited has the right to expect to enforce the restraint clause in the individual employment agreement that purportedly applied if it is enforceable. This is supported by the witnesses who say Mr Ye-Qing signed the agreement. Even if Mr Ye-Qing is correct that he did not sign the agreement there will an argument over what the implied terms were, given he has acknowledged the existence of the agreement, and says he disagreed with the terms as an explanation for not signing it. He has not explained what, if anything, he did to pursue the matter in his deposed evidence where one of 24 Carrot Limited's witnesses says Mr Ye-Qing understood there was a Restraint Clause.

[15] The balance of convenience is therefore more in favour of the applicant considering the early date of the investigation meeting to be held on 29 April 2008, the applicant has narrowed the application of the restraint in the interim, there is a restraint clause that the applicant will presumably prove existed and any delay could impact on the remedies involving damages where it is unclear if they can be recovered from the Respondents. Furthermore there are three witnesses

who depose that the written agreement was signed. If they are right the submission that Mr Ye-Qing has lied will have some merit. The issue of the laptop remains very unclear. Also since the applicant has narrowed the application of the restraint under the suggested terms of the orders the new business set up by Messrs Ye-Qing and Lang will be able to continue and Mr Ye-Qing's livelihood be protected as opposed to the effect of not putting in place the orders and there being an impact on the business of 24 Carrot Limited. However, I am mindful that the losses Mr Hansen referred to may have been caused by an error as Mr Ye-Qing deposed and the impact therefore not to be as great as Mr Hansen has deposed. But at this stage given the respondents conceded they have made some profit from 24 Carrot Limited's customers I am prepared to accept Mr Hansen's deposed evidence that there is a real risk of his company incurring losses involving the respondents. There are other considerations that put the First Respondent's credibility at issue that include what Mr Ye-Qing's involvement was in setting up CPL during his employment with 24 Carrot Limited, the reason for his resignation when he has deposed he did say he was going to China to get married, but did not do so, and said he was resigning for the reasons in his resignation letter that referred to:

... "I have reached the point in life where I must go out and try new business opportunities with my full commitment..."

"All that I ask for from you is your blessing in this new venture, as it is something I am passionate about and have wanted to do for a long time."

[16] His letter falls short of spelling out what he meant by trying new business opportunities and asking for a blessing in his new venture that were ambiguous and potentially deceptive. Also he says he put it about that he was going to China to avoid other staff asking for a job. He advanced no reasons for this to make that plausible in his deposed evidence. In trying to put the applicant back in a position that should have existed on 18 March 2008 before the First Respondent left his employment and where Mr Ye-Qing would have been expected to act and behave in good faith means that the position taken by the applicant on the orders sought should be applied. Overall the balance of convenience favours the applicant.

[17] The final matter to determine is the overall justice to each party. A date has now become available for a full investigation meeting on 29 April 2008. There is a short time before the full investigation meeting to have the matter heard. Any disadvantage suffered by the respondents through the impact of the orders should be able to be addressed quickly. The respondents will still be able to conduct their business and other arrangements can be put in place for the First Respondent in that business. Moreover the First Respondent has not sufficiently detailed any financial impact that the orders will have on him, but he also has the benefit of a quick investigation to have the matters sorted. The respondents have had the benefit of the applicant's concession to

construe the restraint more narrowly to enable the Respondents to continue trading so long as that does not involve the applicant's customers and clients. The case made out by the applicant is particularly strong, but some of the credibility issues will require further proof and that could impact on both parties' positions. I find that the overall justice favours the applicant.

[18] The following interim orders are therefore to apply:

[1] *“The First and Second Respondents are restrained from trading with, soliciting or endeavouring to entice away from the Applicant or any person or organisation who was a client or customer of the Applicant during the time of the First Respondent's employment with the Applicant or who became a client or customer of the Applicant after the termination of the First Respondent's employment. This includes the five named businesses that both parties have referred to”.*

[2] By consent *“The Respondents' are required to return forthwith all documents and electronic data and any computer which belong to the Applicant and are in the possession or under the control of the First and or Second Respondents. This includes all copies of the documentation and data described which shall also be delivered to the Applicant forthwith.”*

[3] By consent *“The Second Respondent is to allow an independent Information Technology expert appointed by the Applicant to check that the Applicant's information and software was ever on, and if so, has been removed from the First and Second Respondents' computers and software. The expert will be organised from a reputable firm of forensic experts. It is agreed the expert's report is to be given to each party and the Authority simultaneously and that the expert will conduct his/her examination without disrupting the Second Respondent's business. Such arrangements are to be left to the parties' solicitors to make the necessary arrangements.*

[19] These are interim orders taking effect from the parties' receipt of this determination until such time as the substantive matters can be disposed of in an investigation by the Authority, and where an investigation meeting is scheduled to resume on 29 April 2008. The responsibility is placed on the First and Second Respondent to take the necessary action with the applicant's customers and clients affected by the terms of this order. The parties understand the names of the

business referred to. If those businesses need to be named and specified I can issue a schedule upon the application of either party. By agreement a meeting can be arranged for any application to vary these orders if necessary on notice.

[20] The determination will be delivered to the parties' solicitors by prior agreed arrangements made with the Authority's support officer because of the urgency given to this matter. Copies of the original signed determination will be provided to the parties' solicitor's offices on Monday morning or be available from the Authority's office by that time.

[21] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority