

one of these customers manages a site. The identity of the applicant company's customers is confidential and, accordingly, I prohibit from publication disclosure of this information.

Employment relationship problem

[2] The applicant (Accessman) seeks an interim injunction restraining the respondent (Mr Barber) from breaching the terms of a non-competition clause¹ contained in his individual employment agreement.

[3] Mr Barber resists the application on the basis that the organisation for which he now works, whilst carrying out business in competition with Accessman, is not employing him in a position which causes him to be in breach of his employment agreement.

[4] As is usual in applications for interim relief of this kind, no oral evidence was heard by the Authority but sworn affidavits were lodged by individuals on behalf of Accessman and by Mr Barber. On behalf of Accessman, sworn affidavits were lodged by Lena Harrington, General Manager of Accessman (first and second affidavits); Verity Verster, Group Credit Controller for Accessman Group; and Adam Gent, Fleet and Maintenance Supervisor for Accessman. Mr Barber's affidavit was an affidavit in reply. None of this affidavit evidence has been tested as it would be in a full investigation meeting, but the Authority may make some common sense assessments of disputed assertions.² However, Mr Barber contests few of Accessman's assertions in his affidavit.

[5] Accessman has provided an undertaking as to damages signed by Ms Harrington in which it agrees to abide by any order that the Authority may make in respect of damages that are sustained by Mr Barber through the granting of the order for an interim injunction, and the Authority decides that it ought to pay.

[6] In the usual way, the Authority held an investigation meeting in order to hear submissions from the representatives of the respective parties.

¹ It is referred to as a *restraint of trade* clause in the individual employment agreement, but I refer to it as a non-competition clause in this determination to differentiate it from the generic use of the term *restraint of trade*.

² *Wellington Free Ambulance Service Inc v Alana Adams* [2010] NZEmpC 59 at [17] – [18].

The legal principles to be applied

Interim injunction

[7] Section 162 of the Employment Relations Act 2000 confers on the Authority the discretionary power to make interim injunction orders.

[8] In determining whether an interim injunction should be granted to Accessman and, if so, under what conditions, if any, the Authority must be satisfied that Accessman can show on a balance of probabilities that:

- (a) there is a serious issue to be tried as to whether Mr Barber may be in breach of the non-competition clause; and
- (b) the balance of convenience favours Accessman, including that alternative remedies would be inadequate.

[9] In addition, I must stand back and consider the overall matter as a whole, and determine where the overall justice of the matter lies until it can be heard substantively.

Restraints of trade

[10] The starting point with respect to the enforceability of restraint of trade clauses (otherwise known as restrictive covenants) was succinctly summarised by the Court of Appeal in *Gallagher Group Ltd v. Walley*³. In *Gallagher Group*, the Court of Appeal stated the position as follows:

... Covenants restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the former employer and in the public interest: Mason v. Provident Clothing & Supply Co Ltd [1913] AC 724 (HL), 733.

[11] In *Fletcher Aluminium Ltd v. O'Sullivan*⁴, the Court of Appeal stated, at [15]:

The Judge then referred to the law. He noted that it was common ground that the restraint was unenforceable unless the company established its reasonableness from the point of view of the employer, the employee, and the general public. He noted that reasonableness must be determined at the time the covenant was entered into, and

³ [1999] 1 ERNZ 490 (CA)

⁴ [2001] 2 NZLR 731, [2001] ERNZ 46 (CA)

referred to the recent decision of this Court in Gallagher Group v. Walley. ... He referred to the need to consider what the parties might reasonably have foreseen at the time of entering into the contract. No issue is taken with that approach.

[12] In the Australian case *Stacks/Taree Pty Ltd v. Marshall (No 2)*⁵, in a passage cited with approval by the Employment Court in *Air New Zealand Ltd v. Kerr*⁶, McDougall J stated:

... the validity of a covenant in restraint of trade is to be assessed having regard to the terms of the particular covenant and the facts of the particular case.

[13] The Employment Court in *Kerr* pulled together these various strands of authority in paragraphs [23] and [24], as follows:

[23] *The approach to restraint covenants is for the Court to determine what the clause means when properly construed and then to consider whether the employer or former employer has established a legitimate proprietary interest requiring protection. Legitimate proprietary interests have been held to include the protection of customer connections, confidential information and the integrity or stability of the workforce. In the present case the proprietary interest claimed is the protection of confidential information. If such an interest is established, then the issue arises as to whether the restraint provision is shown to be no wider than is reasonably necessary. That in turn requires a consideration of the reasonableness of the period of the restraint, its scope and its geographical limits.*

[24] *The reasonableness of the restraint must be established by the party who seeks to enforce the provision; and is then up to the party resisting enforcement to establish that the restraint is contrary to the public interest. If the Court is satisfied as to these matters then, in the exercise of its discretion, it will need to decide whether or not to grant injunctive relief, either interlocutory or permanent as the case may be.*

The issues

[14] The following questions require determination by the Authority at this stage:

- a. Does Accessman have a sufficiently arguable case that the injunctive relief sought should be granted on an interim basis until the Authority can fully investigate and determine the matter?
- b. Are adequate alternative remedies likely to be available to Accessman?

⁵ [2010] NZWSC 77 at [54]

⁶ [2013] NZEmpC 153

- c. Where does the balance of convenience lie between the parties until the matter is fully investigated and determined by the Authority?
- d. Where does the overall justice lie meanwhile?

Background information

[15] Accessman is a specialist Hire Company that supplies for hire scissor lifts, cherry pickers, knuckle booms and other height access machinery. I note from Accessman's website that other specific machinery for hire includes lighting towers and telehandlers.

[16] The applicant company is part of the Accessman group of companies and runs the Christchurch branches. Some of the group's branches are franchised under franchise agreements by owner/operators. The franchisees are all managed through Accessman, based at the Sockburn, Christchurch location, and their organisation and training are monitored and coordinated from there.

[17] Mr Barber was employed by Accessman as a sales representative. It appears that, from August 2014, he worked for a period as a fleet coordinator but then returned to a sales representative position in March 2015. Mr Barber resigned his employment with Accessman and now works for Hirepool Limited (Hirepool). Accessman argues that his employment by Hirepool is in breach of a non-competition clause entered into by Mr Barber while employed by Accessman.

[18] Up until 28 April 2016, when he was dismissed during his notice period, Mr Barber was employed by Accessman under two successive individual employment agreements, one signed by both parties on 17 March 2014 and the other (purportedly) signed by both parties on 1 January 2015. The material clauses are identical in both. These provide as follows:

23. Confidentiality

23.1 *During the course of employment, the Employee may receive and handle intellectual property, knowledge and information relating to the Employer's business or customers which is [sic] confidential or commercially sensitive in nature. Such information may include details of products not publicly known, pricing structures, financial records, matters of internal policy, customer information, business and development opportunities or other matters relating to the business or affairs of the Employer. The Employee is required to hold all such information in the strictest*

confidence both during and after employment. The Employee shall not either during employment or following termination of employment, either directly or indirectly, use such confidential information to the potential or actual detriment of the Employer.

- 23.2 *Any breach of this clause will be treated as serious misconduct and may result in dismissal without notice and/or legal action.*

24. Non-Solicitation

- 24.1 *The Employee shall not, at any time during the term of this agreement, or for a period of 6 months after termination of this agreement for any reason:*

24.1.1 *Directly or indirectly canvass, solicit or attempt to solicit or act for, in respect of work undertaken by the Employer's business, any person, firm or corporation which has been a client or customer of the Employer during the period preceding termination of this agreement.*

24.1.2 *Solicit or approach or endeavour to entice away or discourage from being employed by the Employer, any person who is an Employee of the Employer.*

25. Restraint of Trade

- 25.1 *The Employee shall not engage in another business for a period of 6 months after termination of employment that is in competition with the Employer in the same region that they were employed in or where any Accessman business operates, whether as an employee, independent contractor, partner or otherwise howsoever, and shall not become a director in or a shareholder of a company which proposes to, or does, carry on such activities.*

- 25.2 *The Employee confirms that these restrictions are reasonable in all the circumstances. However, if a Court or Authority finds any of them to be unenforceable, both parties agree to any modification of the restraint required to make the restriction enforceable.*

26. Indemnity

- 26.1 *The Employee hereby acknowledges that if the Employee breaches the clauses relating to confidentiality, non-solicitation or restraint of trade, the Employer may sustain irreparable harm and that the Employer will not have an adequate remedy at law for monetary damages. Therefore, in addition to any other remedies that the Employer may be entitled to under this Agreement or at law or in equity, the Employer shall be entitled to apply to any court or authority of competent jurisdiction for an injunction restraining the Employee or any of the Employee's agents, representatives or persons acting directly or indirectly on the Employee's behalf, from committing or continuing any such breach of this agreement and any other equitable relief. The Employer shall be entitled to an accounting and repayment of profits, compensation, commissions, remuneration or other benefits that the Employee has directly or indirectly realised and/or may realise in connection with any breach of the clauses and*

shall hold the Employer indemnified against all losses, liabilities, costs, claims, charges, expenses, actions, or demands which the Employer may incur or which may be made against the Employer as a result.

26.2 *Nothing in this Agreement shall be construed as prohibiting the Employer from pursuing any other remedy at any time or from time to time at law or in equity, in whole or in part, concurrently or successively, including without limitation recovery of damages.*

26.3 *The Employee agree [sic] to be responsible for all costs and expenses, including legal fees on a full indemnity basis, incurred by the Employer as a result of any action or proceeding commenced to enforce the covenants, undertakings, agreement and obligations in this Agreement.*

27. Severability

27.1 *The various provisions of this agreement are severable and if any provision is held to be invalid or unenforceable by any court or authority of competent jurisdiction, then such invalidity or unenforceability shall not affect the remaining provisions of this agreement.*

[19] Mr Barber asserts that he was forced to backdate the second employment agreement. I accept that assertion (as it is unlikely the parties would have signed it on New Year's Day), but do not believe that this fact adversely affects the lawfulness of the agreement as a whole, as Mr Barber still signed it, on his own evidence, prior to his resignation.

[20] Ms Harrington deposes that there are a number of direct competitors within the access industry, the first and most serious of which is Hirepool, which hires out the same type of equipment as Accessman. Hirepool has five branch locations within Christchurch according to Ms Harrington.

[21] Ms Harrington acknowledges in her affidavit that Hirepool hires out other machinery such as earthmoving and excavation, compacting, landscaping, air tools and air accessories, concrete and masonry, lifting, trailers and welding equipment. A brief look at Hirepool's website shows that Hirepool has 58 branches throughout New Zealand and lists its equipment under 26 different headings, of which only one relates expressly to access equipment. I accept Ms Harrington's evidence that, if not Accessman's key competitor, Hirepool is clearly a significant competitor in terms of the provision of access equipment for hire. I believe that Mr Barber accepts this.

[22] Ms Harrington deposes that the market for access equipment in Christchurch is particularly cutthroat at this time as Christchurch has much of its scaffolding equipment being used on earthquake rebuild and repair sites. She states that,

accordingly, there is a demand for Accessman's type of access equipment and customers largely currently choose who to hire from on the basis of customer relationship and price. She deposes that, if Accessman's prices were ever released into the market, or their competitors knew of them, that would seriously affect Accessman's business in a negative way. She states that there is a lot of undercutting in the industry generally as to price and Accessman is continually trying to maintain its place within the market.

[23] Ms Harrington deposes that Mr Barber was based at the Sockburn site in Christchurch and that a significant part of his employment involved him dealing with Accessman's customers and potential customers and visiting them at their sites across Canterbury. He also dealt with Accessman's suppliers, service agents, other staff, branches and franchisees beyond Canterbury as part of his employment.

[24] Accessman's business also operates beyond Canterbury in Timaru, Blenheim, Dunedin and Cromwell (covering Queenstown and Otago). Ms Harrington states that, as part of his employment, Mr Barber was involved in communications with other sales representatives and other staff outside of Canterbury and across the other branches and had detailed knowledge of what was happening in those other markets too.

[25] Ms Harrington states in her affidavit that the period of six months that is imposed by the non-competition and non-solicitation clauses in Mr Barber's employment agreement was considered *sufficient for Accessman to secure its relationships with its clients should an employee who has relationships with those clients leave*. She states that it would also allow Accessman time to employ a replacement, complete training and have them establish relationships with the customers and learn the industry.

[26] Ms Harrington also deposed that Accessman often tenders for larger contracts many months in advance. In some instances, this process can last over six months and it then has to wait while the project proceeds through the construction consenting process. She says that that is a reason why the six month restraint of trade was inserted into Mr Barber's employment agreement as Accessman's pricing is known for many months prior to particular construction jobs commencing and *it is therefore important that their pricing information is retained in the strictest confidence for well over the termination of any of their employees' employment*.

[27] Ms Harrington emphasises in her affidavit that Accessman's pricing information is of particular significance and that the company puts a lot of time and attention into ensuring that the way it structures its prices is competitive as it tailors each particular contract in relation to its customers separately.

[28] Other information that the company needs to keep confidential, according to Ms Harrington, includes how the company operates its individual contracts, including the delivery of access equipment to sites, how it is maintained offsite and then returned thereafter. Ms Harrington also deposed of a bespoke driver's app that is utilised on all drivers' iPhones and which is tailored to the company's operation. It is not known to what extent the details of that app are treated as confidential by Accessman.

[29] Ms Harrington states that Mr Barber had access to the company's confidential information as a sales representative and that his sales role involved him building and maintaining relationships with his customers, acquiring new customers, promoting sales growth, coordinating relationships with suppliers, service agents, staff and franchisees. He had complete access to the organisation's policies and procedures, pricings and costings.

[30] In addition, Ms Harrington states that Mr Barber was involved in the system of planning for upcoming yearly budgets and business plans and recommending new machinery requirements.

[31] On 11 April 2016, Mr Barber handed Ms Harrington a letter of resignation. Ms Harrington had already become aware that Mr Barber had applied for a job with Hirepool and Ms Harrington had written an email to Mr Barber on 6 April 2016 drawing to his attention the restraint of trade clauses. She reminded him of them again after she had received Mr Barber's resignation. Accessman decided not to take advantage of the garden leave clause contained in the employment agreement and expected Mr Barber to work his notice of one month.⁷

[32] In his response to Ms Harrington dated 12 April 2016, Mr Barber advised that the position he had accepted with Hirepool was Territory Sales Specialist, where the primary focus was on the general hire and earthmoving hire fleet. He stated that he

⁷ This was explained by Ms Harrington in her second affidavit, when she stated that she needed Mr Barber to continue to service their customers. I understand this was because she needed Mr Barber to effect a smooth hand over to her of these customers.

had not been employed as a dedicated access salesperson. He therefore considered that he was not in breach of clause 25 of his employment agreement. Mr Barber, however, gave his assurance of his obligations in relation to the confidentiality clause of his employment agreement and that he would not solicit any Accessman clients or customers against the terms of clause 24. He finished his email by stating that he believed that the seeking of an injunction against him to enforce clause 26 would not be warranted and would not be reasonable.

[33] In reply, Ms Harrington deposes that Mr Barber's role of Territory Sales Specialist would still have him come into direct contact with exactly the same key customers with whom he was dealing whilst employed by Accessman. It is understood that this is because general hire and earthmoving equipment are used on construction sites by construction companies which also hire access equipment.

[34] After the application for the interim injunction was lodged with the Authority, along with Ms Harrington's first affidavit, a further affidavit was lodged and served by her on 10 May 2016, after the statement in reply had been lodged and served. In the second affidavit, Ms Harrington deposes of difficulties that she had had with Mr Barber, both before and after he had been served with Accessman's application on Monday, 25 April 2016. I do not regard all of this information as relevant to the matter in hand as it includes details of text messages passing between Mr Barber and his partner, who, until recently, worked for Accessman, which were insulting of Ms Harrington, but which do not clearly indicate any intention by Mr Barber to breach his covenants.⁸

[35] However, of potential significant relevance is the statement made by Ms Harrington in respect of Mr Barber initially refusing to agree to Ms Harrington accompanying him on the road during his notice period to enable her to meet clients and customers. Mr Barber did eventually agree to this on 28 April 2016, but subject to conditions. These conditions were that a third party had to be present in the vehicle or that they took separate vehicles and met onsite. Mr Barber also specified that, if Ms Harrington wanted to visit any specific sites, she should let him know and he would book an appointment to let her know the day and time.

⁸ Mr Henderson refers to these text messages as indicating that Mr Barber's assurance that he will not disclose confidential information should not be accepted, as they disclose his true attitude towards Accessman. However, I accept Mr Webster's submission that the text messages are open to interpretation, and that some of the derogatory comments came from Mr Barber's partner, rather than from him.

[36] Ms Harrington deposes that she was not prepared to accept the imposition of those terms and that she considered that she needed to meet the customers quickly, given the limited time left that Mr Barber had at Accessman and the number of customers they needed to see. She states that she viewed Mr Barber's conditions as obstructive. She therefore decided that, *as this matter was becoming far too hard, and against a background of non-compliance by Mr Barber previously, and also other issues ... [she] decided to pay him out the balance of his notice period and bring his employment to an end.* Therefore, Mr Barber's employment ended on 28 April 2016 before the expiry of his notice.

[37] Affidavit evidence was given by Mr Gent which stated that, after Mr Barber handed in his notice to leave Accessman, he observed Mr Barber being *much more attentive towards customers in the mornings when he was manning the Accessman front desk.* Mr Gent deposes that Mr Barber went outside to talk to these customers rather than doing so in the office, which he had never done at any previous stage of his employment. Mr Gent also states that, on 26 April 2016, Mr Barber said that he was not going to answer calls any more. This allegation had been put to Mr Barber by Ms Harrington and he had stated, by email, that his remark about not answering calls had been made in jest. He also denied that he had been taking customers outside for secretive discussions in the mornings.

[38] In the affidavit lodged by Ms Verster she deposed that, on 22 April 2016, one of Accessman's important building customers had come in for an impromptu visit and showed Ms Verster an email which the customer had received from Hirepool stating that they *wanted to see Accessman machines off the client's site*, asking what it would take to achieve that. The customer therefore wished to discuss the rates that he had been charged for the access equipment that he was hiring from Accessman to ensure that they were competitive. Ms Verster states that she was unable to retain a copy of the email, and so the Authority has not seen a copy of it.

[39] Ms Verster also deposed that, although Mr Barber now states that he would be based at the Johns Road branch of Hirepool, he had told her before he left that he would be based at Hirepool's Moorhouse Avenue branch. Ms Verster also states that GPS records of the period when Mr Barber was working his notice showed that he had had a number of visits to Hirepool's Clarence Street branch which, Ms Verster states, has predominantly access equipment. A copy of the GPS records were not exhibited to Ms Verster's affidavit however, nor proof that Hirepool's Clarence Street

branch has predominantly access equipment. On the other hand, Mr Barber did not deny these allegations in his affidavit in reply.

[40] Ms Harrington deposes in her second affidavit that Mr Barber refused to provide an undertaking not to commence work with Hirepool until the outcome of the application for an interim injunction, and he has now commenced work with Hirepool.

[41] Mr Barber's affidavit in reply was relatively brief, consisting of just 30 paragraphs and with no exhibits. He accepts that Hirepool is *an opposition company*, but regards the non-competition clause as not applying to him as he was not going to be competing against Accessman with respect to the hiring of access equipment. Mr Barber referred to a letter from the Regional Manager – Southern of Hirepool, Mr Antony Smit, that had been lodged with his statement in reply. The letter stated that Mr Barber had been recruited to fill a vacancy, and included the following paragraphs:

I am able to confirm that Norm Barber has been employed to fill a vacancy that predominantly covers customers hiring earthmoving equipment. His home base will be our Johns Road branch, which specialises in heavy earth moving equipment. His sales focus will be customers requiring earthmoving and general hire (light equipment) in the course of their business.

Hirepool will not require Norm to visit any customers to talk specifically about their requirements for hiring access (scissor lifts or boom lifts) equipment.

[42] This assurance was not contained in a sworn affidavit from Mr Smit, however.

[43] Mr Barber also deposes as follows:

- a. Since he started work at Hirepool on 9 May 2016, he has been confined to the office, going through induction and training;
- b. He will not be approaching customers or attempting to achieve hires until the result of the interim injunction application is known;
- c. He does have knowledge of Accessman's pricing structures and rates, but believes that Hirepool have a reasonable knowledge of these already;

- d. It is common in the hire business for customers to tell hire companies what their competitors' prices were, and he was often given copies of such rates when he worked for Accessman;
- e. He confirms that he will not reveal Accessman's rate charges to Hirepool;
- f. If he were to be enjoined from working for Hirepool, he and his family would be placed in *serious financial strife*. He fears that his partner, who also worked for Accessman, may be dismissed⁹ for sending disparaging texts about Ms Harrington to him, and states that, between them, he and his partner have four children to support.

[44] Mr Barber concludes by making reference to the indemnity clause in his employment agreement with Accessman, and states that, if he caused Accessman *irreparable harm*, he would take financial responsibility for that. With respect, that promise rather misses the point that, by definition, *irreparable harm* cannot be repaired, including by financial compensation. However, I address this later in my determination.

[45] Contrary to what was foreshadowed in the statement of reply, Mr Barber has not *attested to abiding by* the non-solicitation clause in his affidavit. He has agreed in his affidavit not to reveal Accessman's rate charges to Hirepool. However, Accessman has concerns about a wider category of confidential information than just hire charges.

[46] Having summarised the key aspects of the parties' respective affidavit evidence, I now turn to consider the issues to be determined.

Is there a serious issue to be tried?

[47] This first question to determine, alternatively expressed as whether there is an arguable (not necessarily certain) case that interim injunctive relief should be granted, requires the Authority, following *Kerr*, to examine a number of sub issues, as follows:

- a. What the clause means when properly construed;
- b. What legitimate proprietary interest does the clause purport to protect;

⁹ Since swearing this affidavit, Mr Barber's partner has been dismissed.

- c. Whether the restraint term is no wider than is reasonably necessary (considering the reasonableness of the period of restraint, its scope and its geographical limits); and
- d. Whether there has been any real breach of the terms.

What the clause means

[48] His Honour Judge Ford in *Kerr* confirms that the construction of a restraint covenant requires the same principles of interpretation as are to be applied in the construction of any other contractual term. These principles were affirmed by the Supreme Court in *Vector Gas Ltd v. Bay of Plenty Energy Ltd*¹⁰. The first principle was stated in these terms:

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[49] Whilst not drafted particularly well, the non-competition clause in Mr Barber's individual employment agreement is relatively clear and simple and can, I believe, be broken down into the following elements:

- (a) For a period of six months starting from the date when Mr Barber's employment ended, Mr Barber must not:
 - a. Engage in another business which is in competition with Accessman in the same region that Mr Barber was employed or where any Accessman business operates;
 - b. as an employee, independent contractor, partner, or otherwise;
- (b) For a period of six months starting from the date when Mr Barber's employment ended, Mr Barber must not become a director in or a shareholder of a company which proposes to or does carry on activities in competition with Accessman.

[50] A key question about this restraint of trade clause is what is meant by the term *in competition with*. This phrase is not defined in the employment agreement.

¹⁰ [2010] NZSC 5; [2010] 2 NZLR 444 at [61]

However, I view the term as carrying its normal and everyday meaning within the context of the agreement within which the term is used. That is to say, a business that is in competition with Accessman would be an independent entity which provides for hire the same or similar access equipment as Accessman to the same or similar customer base as Accessman.

Is there a legitimate proprietary interest requiring protection?

[51] It is trite law that a restraint covenant that prevents competition per se is unlawful. This is a fundamental principle which underpins the law in Common Law countries in respect of restraint provisions. However, as was accepted by the Employment Court in *Kerr*, a non-competition restraint covenant can appropriately be relied upon and enforced in order to protect certain subject matters such as an employer's legitimate proprietary interests¹¹. It is for Accessman to satisfy the Authority that there is a proprietary interest justifying such protection.

[52] The non-competition clause itself does not disclose any proprietary information that it is designed to protect. However, it is necessary to read this non-competition clause in the wider context of the employment agreement as a whole and, in particular, the confidentiality and non-solicitation clauses. It has been accepted for many years now that a covenant against disclosing confidential information alone is often not satisfactory as, in the words of Lord Denning:

... it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.

[53] This quotation, from the English case of *Littlewoods Organisation Ltd v. Harris*¹² was cited with approval by the Full Court of the Employment Court in *Transpacific Industries Group (NZ) Ltd v. Harris*¹³.

[54] Ms Harrington deposed at length in her affidavits about the confidential information that was in the mind of Mr Barber, including, in particular, the pricing structure utilised by Accessman in relation to its key customers, but also its *sales*

¹¹ *Kerr* at [30]

¹² [1977] 1 WLR 1472, [1978] 1 All ER 1026 (EWCA)

¹³ [2013] NZEmpC 97, [2013] ERNZ 267

strategies, budgets, client franchise and supplier details, all of which he acquired during his employment by Accessman, which was not in a junior role. I accept that such information is capable of constituting significant confidential information for the business of Accessman. Given the competitive nature of the hiring of access equipment within Christchurch, and the relatively limited range of such equipment available to the competing businesses to hire out, it would appear that pricing is a key differentiating factor between competing businesses.

[55] Mr Webster asserted in his submissions that Hirepool will be well aware of the information that Accessman seeks to protect because such pricing information is well known by Hirepool and other competitors generally. In other words, Mr Webster was submitting that the proprietary interest Accessman relies on has lost the sanctity of being confidential information as it has passed into the public domain through no fault of Mr Barber.

[56] I accept that Accessman's general pricing rates are likely to be well known. However, Ms Harrington deposed that each particular contract is tailored to each customer separately. Mr Barber did not contest that in his affidavit. This means that, for such tailored information to have passed into the public domain, it must have been leaked by each customer. Mr Barber did not depose that this was the case, and it is, frankly, unlikely that there would have been a wholesale leaking of such information by several customers of Accessman. I am satisfied, therefore, that this tailored pricing information is likely to have retained the quality of confidentiality capable of protection.

[57] In addition, Mr Webster said that Mr Barber does not have access to detailed information relating to the tenders that have recently been made by Accessman. However, this was, with respect, evidence from Mr Webster, rather than Mr Barber, as Mr Barber did not address the issue of tenders, and what level of detail he knows and does not know, in his affidavit evidence at all.

[58] As a result of this paucity of detailed evidence from Mr Barber, and in the absence of an obvious lack of credibility in the affidavits of Ms Harrington, I am bound to accept her evidence in this regard.

[59] I therefore accept that the non-competition clause at 25.1 of Mr Barber's employment agreement does not seek to restrain Mr Barber from working for a

competitor *per se* but seeks to protect Accessman's legitimate proprietary interests; namely, its confidential information and, in particular, its pricing structures.

[60] I also accept that Mr Barber does, or is likely to have, confidential information in his head belonging to Accessman which remains confidential.

Is the restraint provision no wider than is reasonably necessary?

The period of restraint

[61] The non-competition clause purports to restrain Mr Barber for a period of six months from the date of the ending of his employment (that is to say, in his case, until Friday, 28 October 2016). Mr Webster said on behalf of Mr Barber that he accepts that a six month restraint is standard in the industry. This concession appears to have been based upon the fact that Hirepool's employment agreement contains covenants bearing a similar period of restraint. However, despite this concession, which I believe was perhaps too hastily given, I am obliged to consider objectively whether a six month duration is reasonable or not.

[62] In considering the reasonableness of the duration of the restraint, it is necessary to take into account how long the confidential information needs to be protected. Connected with this question is how long it would reasonably take Accessman to consolidate its position with its customers so as to reduce to an acceptable level the risk that they would be tempted to follow Mr Barber to Hirepool.

[63] I understand that Accessman is most concerned about its connections with its key customers who appear to be shared with Hirepool in any event as they are major building companies operating in Christchurch. What is of interest, therefore, in my view, is not so much how long it would take for relationships with those key customers to be consolidated, but rather how long the confidential information that Accessman seeks to protect will need to be protected.

[64] The applicant did not give detailed information about this issue, although indicated that tenders may take up to six months to be awarded. However, no one for Accessman stated whether there were any tenders in process at the time of Mr Barber's termination. Such information would have been helpful, as it would have enabled me to determine the risk that Mr Barber was in possession of sensitive pricing information which would remain sensitive for six months. I infer from the fact that no

such details have been provided in what was otherwise comprehensive affidavit evidence from Ms Harrington that that is not the case.

[65] I suspect, however, that pricing information will change relatively quickly because of the highly competitive nature of the access equipment hire business. The information provided by Ms Verster in her affidavit about a major customer seeking to renegotiate the cost of the hiring of the equipment he had onsite suggests that these prices could vary even after an agreement has been entered into between Accessman and a major customer.

[66] I am sceptical that the applicant requires six months to protect the confidential information that it seeks to protect. However, it must be noted that Mr Barber did not give any evidence in his affidavit that supported a contention that six months was too long. Indeed he did not comment on the evidence of Ms Harrington in regard to this matter at all.

[67] Section 8 of the Illegal Contracts Act 1970 provides as follows:

8 Restraints of trade

(1) Where any provision of any contract constitutes an unreasonable restraint of trade, the Court may—

(a) Delete the provision and give effect to the contract as so amended; or

(b) So modify the provision that at the time the contract was entered into the provision as modified would have been reasonable, and give effect to the contract as so modified; or

(c) Where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.

(2) The Court may modify a provision under paragraph (b) of subsection (1) of this section, notwithstanding that the modification cannot be effected by the deletion of words from the provision.

[68] Section 162 of the Act expressly enables the Authority to make any order that the High Court or District Court may make under a variety of enactments, including the 1970 Act. Therefore, the Authority has the discretionary power to modify the terms of the non-competition clause to the extent that it is unreasonable, subject to the constraints contained in both the 1970 Act and s 164 of the Act itself.

[69] In respect of the circumstances under which a restraint clause may be modified under s 8 of the 1970 Act, the full Employment Court in *Transpacific* endorsed the view of the full Court of the High Court in *CE Elley Ltd v Burgess*¹⁴ when citing

¹⁴ (1997) 7 TCLR 582

paragraph 9, from which the following extract comes. Following a summary of previous authorities, the High Court said:

The effect of the cases is to emphasise the discretionary nature of the jurisdiction and we think that the intervention of the Court will depend in every case on an assessment of the circumstances which are proved. We do not accept that there is a presumption that the Court will modify the covenant as distinct from the other courses open to it, rather each case must be considered in relation to the relevant circumstances and the emphasis which it is appropriate to place on each of these in considering the matter as a whole.

[70] This passage suggests that it is necessary to assess carefully the circumstances in each case before embarking upon modification under s 8 of the 1970 Act. At this interim stage, I am not satisfied that enough evidence has been adduced by either party which would enable me to assess whether it is appropriate to modify the non-competition clause by reducing the period of restraint, and if so, what period to substitute.

[71] At this stage, on the basis of uncontested evidence from Ms Harrington, I believe that there is an arguable case, albeit a weak one, that six months is necessary to legitimately protect Accessman from the deliberate or inadvertent disclosure of its confidential information to Hirepool.

The scope of the restraint

[72] The scope of the non-competition clause restrains Mr Barber from working for a business that competes with Accessman. This is wider in scope than a restraint that prevented him from dealing with customers of Accessman or which prevented him from doing work that competed with Accessman. On the face of it, the clause prevents Mr Barber from working for Hirepool in any capacity whatsoever, even one which did not involve him from seeing customers.

[73] However, given that I have found that the rationale of the clause is to protect Accessman from its confidential pricing information being disclosed, even working in a non-customer facing role would still expose Accessman to risk of deliberate or inadvertent disclosure of its pricing information. The use of non-competition clauses to protect confidential information is well established in New Zealand law, and the

Employment Court has acknowledged that their use is legitimate where there is a risk of innocent disclosure and inadvertent use of confidential information.¹⁵

[74] Therefore, I do not regard the scope of the non-competition is too wide.

The geographical limit of the restraint

[75] The non-competition clause restrains Mr Barber from working for a business that operates a competing business in the same region as Mr Barber was employed in, as well as any region where any Accessman business operates. It is understood that this encompasses Christchurch, Timaru, Blenheim, Dunedin, Queenstown and Otago.

[76] The first element of the non-compete is reasonable, as, clearly, if Mr Barber worked in the Canterbury region, he will have made customer contacts in that region. It is less clear that the second element is reasonable, although I note that Ms Harrington referred to Mr Barber having detailed knowledge of what was happening in the other regions because of his communications with sales representatives and other staff outside of Canterbury. Mr Barber did not contest this evidence in his affidavit in reply.

[77] I therefore consider that the geographical scope of the non-competition clause was not unreasonable from the point of view of Mr Barber's employment.

Has there been any real breach of the terms of the non-competition clause?

[78] Mr Barber argues that, whilst he is working for a competing business, his work will not compete because of the different division of Hirepool in which he will be located. However, that is not what the clause says. It does not say that Mr Barber may not carry out work that competes with Accessman, but that he may not work for a business that competes. That is obviously of a wider scope, which I have examined above, but clearly Mr Barber is in breach of the clause, by the very fact of him working for a competitor which falls within the temporal and geographical limits prescribed.

Conclusion

[79] I conclude that there is a serious issue to be tried, as Accessman has a legitimate proprietary to protect (its confidential information), Mr Barber has had

¹⁵ See *Allright v Canon New Zealand Limited* AC47/08, 3 December 2008, Judge Couch.

access to that information throughout his employment as a sales representative while working for Accessman, he is working for a direct competitor of Accessman, and the non-competition clause is enforceable subject to further enquiry as to whether the temporal limit should be modified downwards. Even though Mr Barber works for a different division not involving access equipment, the risk of wilful, inadvertent or coerced disclosure of Accessman's confidential information remains real.

[80] I consider that the appropriate time limit imposed by the restraint requires further investigation, but that, even if modified, it is unlikely to be modified to a period less than three months. The Authority will, in any event, complete its substantive investigation into the application before the expiry of three months from Mr Barber's dismissal.

Are adequate alternative remedies likely to be available to Accessman?

[81] The Employment Court in *Hally Labels Limited v Kevin Powell*¹⁶ summarised the principle behind the necessity for this enquiry as follows¹⁷:

One of the bases for an interim injunction and the subsequent granting of the permanent injunction for the balance of the restraint period would have been that damages were shown to be an inadequate remedy for Hally. This factor is taken into account in the balancing exercise undertaken by the Court in considering whether injunctive relief should be granted. Damages for breach of confidentiality, fidelity and good faith are notoriously hard to prove, as is indeed evidenced by this case. It is for this reason the Court, notwithstanding the prima facie position, is ready to uphold restraints of trade; in this case to ensure a remedy to the employer to keep the employee totally away from the competing employer's workplace for the time necessary to protect and fortify its interests. Injunctive relief is granted upon the assertion that the plaintiff is unlikely to be adequately protected by damages.

[82] The risk that Accessman faces in this case is that the disclosure of confidential information would potentially lead to the loss of custom by Hirepool being able to undercut Accessman.¹⁸ It may well be that Accessman will be unable to ascertain the cause of the loss of a customer if the customer failed to declare its reason for leaving Accessman.

¹⁶ [2015] NZEmpC 92

¹⁷ Paragraph [117].

¹⁸ This is not to suggest that there was any evidence before the Authority that this is Hirepool's intention. However, Accessman is entitled to protect itself from the risk of price undercutting caused by unlawful disclosure of its confidential information, especially in a highly competitive environment.

[83] Accessman also faces the loss of future opportunities for custom. This is because a customer who is enticed away from Accessman by lower pricing may well come to the conclusion that Hirepool is generally cheaper when it comes to access equipment, and will stay away. These losses are also difficult to quantify¹⁹.

[84] In addition to the difficulties of quantification, Mr Barber has deposed of his financial difficulties. This suggests that loss sustained by Accessman caused by disclosure of confidential information could not be recovered from Mr Barber in any event.

[85] I therefore conclude that, on balance, alternative remedies would not be adequate.

Who does the balance of convenience favour?

[86] Here I must balance the prejudice that Mr Barber is likely to suffer if the interim relief is granted against the prejudice that Accessman is likely to suffer if it is not.

[87] Mr Barber deposed that he will be seriously financially inconvenienced if he were to be restrained from working for Hirepool, especially if his partner were to be dismissed by Accessman²⁰. However, Mr Barber has not disclosed any evidence to show that he would not be rehired by Hirepool if he were to be enjoined for working for them for a period of restraint, whatever it may turn out to be. No evidence has been adduced as to what Hirepool's intentions are.

[88] Mr Webster stated during his submissions that Mr Barber's partner has now been dismissed by Accessman. I accept that this means that Mr Barber's household will be without immediate income if the interim injunction is granted. However, whilst nothing is known about her situation, unemployment is not necessarily a long term situation and, fortunately, Christchurch offers a buoyant job market. It would not be appropriate to say any more about that situation, in the event that it ends up before the Authority as a separate matter.

[89] Finally, Mr Barber has not deposed in his affidavit what chances he would have of finding alternative employment if he needed to find new work urgently, or if

¹⁹ See the comment of the Employment Court in *Marshment v Sheppard Industries Limited* [2010] NZEmpC 98 at [49]

²⁰ See footnote 9.

Hirepool decided not to rehire him, if an injunction against him working for them for a limited period were granted. One could speculate for example that, as he has managed to find employment with Hirepool hiring out non access equipment, he may be able to find work selling construction or other equipment, especially as he is obviously willing to retrain, and is keen *to branch out*, as his affidavit indicates.

[90] In summary, whilst Mr Barber would undoubtedly be inconvenienced if he were to be restrained from working for Hirepool for up to a further five months, he has not given enough objective evidence to enable me to gauge accurately exactly what the level of inconvenience (or prejudice) would be.

[91] The prejudice to Accessman, on the other hand, is more readily ascertainable. If its confidential pricing information were to be leaked to Hirepool, then Hirepool would be in a position to undercut Accessman which, in turn, is highly likely to cause the loss of Accessman customers, or at least expected revenue if it had to undercut in turn in order to retain customers.

[92] It is also likely that Accessman would not be able to calculate accurately the cost of that lost custom, as it may not always be told why a customer discontinues hiring from it, or fails to award it a tender.

[93] All in all, on the evidence presented, I believe that the balance of convenience favours Accessman.

Where does the overall justice lie?

[94] Mr Barber is already working for Hirepool, and it is relevant to note that Mr Barber declined to refrain voluntarily from doing so until the Authority could investigate the application for interim relief.

[95] I also note that Mr Barber was not willing to allow Ms Harrington to accompany him to sales visits during his notice period without conditions being imposed. As an employee of Accessman at that time, it is surprising that he felt able to refuse what would appear to have been a reasonable instruction.

[96] In addition, it is clear from Ms Harrington's affidavit evidence (which is not refuted by Mr Barber) that Mr Barber had unrestricted access to Accessman's customers, and confidential pricing information. That involved a considerable element of trust in Mr Barber.

[97] In return, Accessman was entitled to expect that its customer base and confidential information would be protected. In order to try to achieve this, it drafted into its employment agreement with Mr Barber restraint clauses the intent of which is plain.

[98] Mr Barber stated in his affidavit that he *very reluctantly agreed to sign an employment agreement that Ms Harrington insisted on backdating to the 1 January 2015. This affected my bonus payment.* No further information is given, and I do not have enough information to find that there was any unfair bargaining by Accessman, or that Mr Barber signed the agreement under duress. In the absence of cogent evidence of that kind, I must conclude that, reluctant or not, he agreed to sign the agreement, and be bound by it.

[99] Furthermore, Mr Barber was warned twice by Accessman that Hirepool was a direct competitor of it, the first time before Mr Barber tendered his resignation. He could, therefore, be said to have made his decision to resign and work for Hirepool with his eyes open. He does not depose that he sought advice prior to resigning, or that he attempted to negotiate with Accessman to agree a way forward which would give it comfort. All he states is that he did not think the non-competition clause would apply to him because he would not be competing with them with the hire of access equipment.

[100] I am also aware that Mr Barber may not intend to disclose confidential information to Hirepool, but that pressure may be put on him to do so. No evidence has been presented to suggest this will happen, but it is a possibility which Accessman is entitled to guard against. The risk is not fanciful that Mr Barber could feel pressured into disclosing such information given that he is under financial pressure to earn his living, by his own evidence. Indeed, a clause of Mr Barber's employment agreement with Hirepool requires him to refer to the directors of Hirepool *all business contacts and all ideas, inventions and opportunities, of which [he] becomes aware, which relate to the business of Hirepool or of its principals.* This arguably would require Mr Barber to disclose information to Hirepool which would put him in breach of his post termination duties to Accessman.

[101] Furthermore, as Mr Henderson pointed out, Hirepool has not presented any affidavit evidence to depose as to what its intentions are, or to give any assurances. An unequivocal personal undertaking from a director of Hirepool stating that Hirepool

would encourage Mr Barber to adhere to his post termination covenants, and that it would not put any pressure on him to disclose confidential information relating to Accessman would have been persuasive.

[102] One final issue to consider is whether the dismissal of Mr Barber during his notice period could be a repudiatory breach of his employment agreement, which could result in post termination covenants falling away. Without having investigated the matter thoroughly, whilst that dismissal may have been procedurally unjust, it would appear to have been substantively just given Mr Barber's obligations to Accessman to follow reasonable instructions, and the fact that he was going to a competitor. Where such a dismissal is likely to be substantively just, it is unlikely to be a repudiatory breach of contract.

[103] Overall, I am satisfied that Accessman has the stronger prospect of establishing in the Authority's substantive investigation meeting that its non-competition restraint is fair and enforceable, possibly after its term has been reduced by modification to a lesser period. I am also satisfied that the overall justice of the case favours the granting of an interim injunction.

Determination

[104] On balance, based on the affidavit evidence presented, and the representatives' submissions, I am satisfied that it is appropriate to grant the interim injunction sought, whilst noting that further enquiry needs to be made as to whether the period of restraint is too long and, if so, whether it is appropriate to modify the clause by shortening the period. Such an enquiry will be carried out by the Authority at its substantive investigation meeting.

Orders

[105] In reliance on an undertaking as to damages given by Accessman dated 19 April 2016, I order that Mr Barber comply with clause 25.1 of his individual employment agreement with Accessman dated 1 January 2015. As he is already employed by Hirepool, his employment by Hirepool is to cease by no later than Wednesday 25 May 2016, and he is not to be re-employed by that entity until further order, or until Friday 28 October 2016, whichever is the sooner.

Next steps

[106] The Authority's substantive investigation into this matter will take place on 1 July 2016. The parties have agreed the timetable for the service and lodging of further evidence.

[107] In the meantime, in anticipation of the Authority potentially exercising its powers under s 8 of the 1970 Act, and in order to ensure that s 164 of the Act is complied with in such an event, I direct the parties to further mediation to attempt in good faith to resolve the problem as to what the appropriate period of restraint should be.

Costs

[108] I reserve costs until after the conclusion of the substantive investigation meeting.

[109] If the parties are able to settle their differences at mediation so as to avoid the need for a substantive investigation meeting, but cannot agree on costs, then they may apply to the Authority for a determination on the costs of this interim injunction application, provided that such application is served and lodged in writing within 14 days of any record of settlement or settlement agreement being signed by both parties and that any response is served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority