

ATTENTION IS DRAWN TO THE ORDER  
PROHIBITING PUBLICATION OF THE  
PARAGRAPHS 56 AND 57  
REFERRED TO IN THIS SETTLEMENT

Determination Number: AA 236/06  
File Number AEA 1129/05/05

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Kerry Finnigan (Applicant)

**AND** Hanover Group Limited (Respondent)

**REPRESENTATIVES** Harry Waalkens QC, Andrew Caisley & David France, Counsel  
for Applicant  
Caitlin Wright & Marie Whisker, Counsel for Respondent

**MEMBER OF AUTHORITY** Leon Robinson

**INVESTIGATION MEETING** 22 December 2005

**DATE OF DETERMINATION** 7 July 2006

**DETERMINATION OF THE AUTHORITY**

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**The Authority determines that this employment relationship problem shall be resolved by the following orders:-**

- A. (i) Hanover Group Limited is ordered to comply with clause 2.1 of the Deed of Settlement and pay to Kerry Finnigan the gross sum of \$50,000.00 (being the minimum aggregate bonus specified therein);**
- (ii) Hanover Group Limited is ordered to comply with clause 3.1(b) of the Deed of Settlement by paying to Kerry Finnigan the gross sum of \$590,000.00;**
- (iii) Hanover Group Limited is ordered to comply with clause 3.1(c) of the Deed of Settlement and pay to Kerry Finnigan the sum of \$60,000.00;**
- (iv) Hanover Group Limited is ordered to pay to Kerry Finnigan any outstanding salary, holiday pay (including long service leave) and reimbursable expenses. The payment for holiday pay shall take into account the payment of \$50,000.00 ordered at (i) above;**
- (v) Hanover Group Limited is ordered to pay interest to Kerry Finnigan on the total sum of the above orders at the rate of 9% per annum as from 28 October 2005 until the date of payment.**
- B. The above orders are to be obeyed within 14 days of the date of this Determination.**
- C. In the event that the parties are unable to agree on the sum due at order numbered A(iv) above, either party may make application in writing, no later than seven days after the date of this Determination, for further investigation by the Authority.**
- D. The evidence given at paragraphs 4, 5, 16 and 17 of Kerry Finnigan's witness statement dated December 2005, and the evidence given in relation to Speirs Finance Limited and Landco, is prohibited from publication.**
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## The problem

[1] The applicant Mr Kerry Finnigan ("Mr Finnigan") claims his former employer Hanover Group Limited ("Hanover") has failed to meet its obligations to him in respect of a settlement recorded in a Deed between the parties ("the Deed"). Mr Finnigan applies to the Authority for an investigation of the problem and asks for formal orders by way of enforcement, together with interest and costs.

[2] Hanover is one limited liability company in a group of companies collectively known as the Hanover Group.

[3] Hanover replies that Mr Finnigan acted in breach of the terms of the Deed and it asks the Authority to make formal orders by way of damages for losses it alleges Mr Finnigan's conduct caused it.

[4] I regret the delay in concluding my investigation and apologise to the parties for any inconvenience the delay may have caused.

## The facts

[5] Mr Finnigan was formerly employed by Hanover as its Chief Executive Officer. Hanover disestablished Mr Finnigan's position in circumstances which he alleged gave rise to a personal grievance. The parties negotiated a settlement of that alleged personal grievance the terms of which were recorded in the Deed.

[6] The Deed, apparently signed on 12 May 2005, contained terms that:-

- a. Mr Finnigan's employment would terminate by resignation effective from 28 October 2005;
- b. Mr Finnigan would be subject to a restraint of trade preventing him from being employed by a competitor prior to 29 October 2005;
- c. on 28 October 2005 Mr Finnigan would be paid:-
  - i. a lump sum bonus of \$50,000.00; &
  - ii. all outstanding holiday salary, holiday pay (including long service leave) and expenses; &
  - iii. the gross sum of \$590,000.00; &
  - iv. \$60,000.00.

[7] The payments in the Deed due to Mr Finnigan were in consideration for his agreement that:-

- (i) his employment would terminate by resignation effective on 28 October 2005;
- (ii) up until termination date, he would carry out such duties as required and instructed by Hanover. Without limitation, it was envisaged that Mr Finnigan would during that period:-
  - (a) use all reasonable commercial endeavours to, by way of communications approved by the Employer and otherwise through his conduct and actions, maintain the stability of the Group's depositor base, and relationships with

investment advisors, financial planners, money managers and other financial intermediaries; &

- (b) at all times act in the best interests of the Group; &
- (c) not use confidential information held by him for the commercial detriment of the Group; &
- (d) not directly or indirectly, either on his own account or as agent, advisor, employee, contractor or consultant for another person or organisation, engage in any trade or business within New Zealand which competes with any trade or business being carried on by the Group at the date of the Deed, provided that he may undertake property investments and/or development work with the prior written consent of the Group which shall not be unreasonably withheld where the relevant activity is passive and is not otherwise likely to adversely impact the ability of Kerry to discharge his obligations under clause 2 of the Deed;
- (e) not solicit business or employees from Hanover;
- (f) he would resign as director from boards of specified companies in the Group;

[8] Mr Finnigan continued to be employed by Hanover up to 28 October 2005. Hanover did not make the payments set out in paragraph [6] above.

[9] Mr Finnigan wrote by email to Hanover on 31 October 2005 making request for payment. Hanover did not respond or pay.

[10] Mr Finnigan's solicitors wrote to Hanover on 2 November 2005 making formal demand on Mr Finnigan's behalf for payment. Hanover did not respond to the solicitors and nor did it meet the demand.

[11] Hanover's initial response to Mr Finnigan's statement of problem was prepared without assistance from its legal advisers. The essence of that initial reply is this:-

*On the whole, the applicant put himself in considerable and material conflict with the Hanover Group during the notice period in the Deed of settlement, this resulted in the applicant being unable to act as a director, or as an effective employee in the business. This left the company with no option other than to ask the employee to leave the business.*

[12] Hanover subsequently did seek its solicitors' advice and an amended statement in reply was lodged. That reply better specified that Mr Finnigan had acted to fundamentally breach the Deed. As a consequence of the breaches alleged, Hanover wrote by letter dated 9 December 2005 electing to cancel the Deed pursuant to the provisions of the Contractual Remedies Act 1979. Hanover now asks the Authority to make orders directing that Mr Finnigan repay to it \$525,000.00 together with damages for profits derived by him in breach of his fiduciary obligations as a director and employee.

## The issues

[13] It has been held that the Authority's jurisdiction, in relation to the present problem, is derived from section 161(1)(r) of the *Employment Relations Act 2000* ("the Act"). As such, the Authority is empowered to consider both questions of whether there has been a breach of the Deed and if appropriate, award remedies for breach of contract particularly those conferred by the Contractual Remedies Act 1979<sup>1</sup>.

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<sup>1</sup> *Thomas Morrison Kerr -v- Associated Aviation (Wellington) Limited*, unreported, WRC20/03, 17 August 2005, Shaw J

[14] Hanover cites particular discrete breaches by Mr Finnigan and because of such breaches, it says it is entitled to cancel the contract (the Deed). Section 7(3)(b) of the *Contractual Remedies Act 1979* provides that a party may cancel a contract if:-

*A term of the contract is broken by another party to the contract*

[15] By section 7(4) of the *Contractual Remedies Act 1979*:-

*A party may exercise the right to cancel if, and only if-*

(a) *the parties have expressly or impliedly agreed that the truth of the representation, or as the case may require, the performance of the term is essential to him; or*

(b) *the effect of the misrepresentation is, or, in the case of an anticipate breach will be -*

(i) *substantially to reduce the benefit of the contract to the cancelling party; or*

(ii) *substantially to increase the burden of the cancelling party under the contract; or*

(iii) *in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.*

[16] I pause to note that since December 2004, settlements under section 149 of the Act may not be cancelled under section 7 of the *Contractual Remedies Act 1979*. That provision does not apply to the present settlement.

[17] Each of the alleged breaches is now discussed in turn.

### ***Employment with Strategic Finance Limited***

[18] First Hanover criticises Mr Finnigan because it says that by entering into an employment arrangement with Strategic Finance Limited on or before 28 October 2005, Mr Finnigan failed to disclose this arrangement and he was obliged to disclose it.

[19] It is not unlawful or contrary to any duty for an employee to look for alternative employment or to be negotiating the terms and conditions of any subsequent employment. If Hanover was concerned that Mr Finnigan should not take steps to secure alternative employment, it ought to have negotiated such a provision. It did not do so.

[20] I find that Mr Finnigan had discussions with Strategic Finance Limited after the Deed was signed but prior to 28 October 2005. I find that in mid August 2005 he advised Hanover's Mr Mark Hotchin ("Mr Hotchin") of those discussions. Mr Finnigan informed Mr Hotchin by email of his employment negotiations and he advised he would not be attending board meetings of any of Hanover Group's companies. Mr Finnigan wrote this email to Mr Hotchin on 24 August 2005:-

*Mark*

*Further to recent discussions and e-mails I am committed to ensuring that my departure from Hanover is as smooth as possible. With this in mind I have disclosed to you that I am in negotiations with another potential employer, for employment commencing after my termination date with Hanover.*

*In the event that those negotiations are satisfactorily concluded, I will make no announcement or statement to the market (in accordance with our agreement). I will also encourage the potential new employer to make no announcement to the market, if that is Hanover's preference.*

*You should be aware however that I cannot prevent the potential new employer from making an announcement, nor am I legally required to prevent such an announcement being made.*

*In good faith I have foreshadowed to you that I am in negotiations and hope that those negotiations will be satisfactorily concluded. I have requested that the potential new employer not make an announcement and will continue to press the point.*

*Also in good faith I have suggested to you that you may not wish me to be involved in the next round of Directors meetings. I am reading will and available to undertake all the responsibilities of my role and reiterate that I will fully comply with all terms of my employment and our settlement agreement, including all those express and implied terms relating to confidential information etc.*

*If you have any further questions or concerns please advise me. In the meantime, I look forward to working with you to ensure that my exit from the business is as smooth as possible.*

Kerry

[21] Hanover tells the Authority it was concerned to manage the public announcement of Mr Finnigan's departure out of concern for its depositor base. It is correct that the Deed contains a mechanism in that regard at clause 12. However, the Deed prepared by Hanover's advisers, makes no provision about Mr Finnigan's subsequent employment and the management of any announcement of that event. I accept that Hanover was genuinely concerned about managing Mr Finnigan's exit, but its Deed does not protect its interests in that regard in relation to any announcement of new employment.

[22] Nor was Mr Finnigan's new employment in breach of the restraint under clause 9.2 of the Deed. I am satisfied that Mr Finnigan did not commence his new employment until 1 November 2005. Mere negotiations for that new employment do not constitute a breach of the restraint of trade clause of the Deed.

[23] Mr Finnigan is to be commended for the steps he took with his new employer by requesting the new employer delay the announcement of his new appointment. There is no evidence that Mr Finnigan participated or permitted a media release by Strategic in a manner which had a detrimental effect on Hanover's business.

[24] I find that Mr Finnigan did not breach the Deed by entering into an employment relationship with Strategic Finance Limited which was to commence on 1 November 2005, or by commencing and continuing negotiations for that new employment.

### **Landco negotiations**

[25] Hanover says Mr Finnigan breached his obligation to act in Hanover's best interests because while he was in discussions with Strategic Finance Limited for employment, he promoted that company's interests over Hanover's by deciding not to charge Strategic Finance Limited penalty interest and fees, and according to Mr Hotchin's evidence, by taking security over second rate assets and permitting Strategic Finance Limited to take security over Landco's prime assets. Mr Finnigan denies the allegation. He says the decision not to charge Strategic Finance Limited penalty interest was Mr Hotchin's decision. That appears to be correct because Mr Hotchin's evidence is that the decision was on Mr Finnigan's recommendation. Hanover offers no corroboration of its allegations whatsoever.

[26] Mr Hotchin concedes:-

*While I accept that this settlement might have proceeded on similar terms without Kerry's involvement, Kerry should not have had any involvement with this transaction while he was negotiating his employment with Strategic. Not only did Kerry negotiate and accept employment with Strategic while working on this deal, but he misled us about when that negotiation and acceptance took place.*

[27] Because of that evidence, I am not persuaded that I should find any action by Mr Finnigan in breach of the Deed and which occasioned loss to Hanover. I conclude any such action even if proved, was inconsequential. It seems to me that the essence of Hanover's complaint is that Mr Finnigan "misled" Hanover about the negotiations for his subsequent employment. I do not

agree. I consider Mr Finnigan's correspondence and the particular email of 24 August 2005 was honest, up-front and commendable. His conduct in this regard was entirely consistent with his obligations of good faith.

[28] Equally compelling in my view is the revocation of Mr Finnigan's delegated authority in relation to this transaction. Hanover by its letter of 17 May 2005 removed any authority Mr Finnigan had to act in the manner now said by Hanover to amount to a breach of duty.

[29] I find Mr Finnigan did not act in breach of his duty in relation to this particular transaction. I find too, that Hanover suffered no proved loss recoverable in damages.

### ***Diverting mezzanine finance opportunity***

[30] It is next alleged that Mr Finnigan breached the obligation to act in Hanover's best interests by forwarding work opportunities from Hanover to Strategic Finance Limited and failing to disclose opportunities of which he became aware.

[31] Mr Hotchin produces an email dated 8 September 2005 from Mr Finnigan to one Mr Graham Jackson of Strategic Finance Limited ("Mr Jackson"). Mr Finnigan forwarded a mezzanine-funding enquiry sent to him at Hanover to Mr Jackson. Mr Finnigan defends the allegation and says that Hanover declined the opportunity.

[32] Mr Colin Saunders, the General Manager of Hanover Equity Partners Limited ("Mr Saunders"), gives evidence to the Authority that he was not presented with the email request by Mr Finnigan until the following day on 9 September 2005. He says too that he copied Mr Finnigan in on an email dated 14 September 2005 advising Hanover would not get involved.

[33] Having considered the evidence, I conclude that Mr Finnigan forwarded the email opportunity to Mr Jackson before he presented it to Mr Saunders. I find that Mr Finnigan acted contrary to his duties to Hanover in doing so. His actions amounted to a breach of duty. However, the breach was inconsequential and Hanover suffered no loss because of it. There being no loss to Hanover, there can be no orders for damages in relation to this breach, whether that breach is of the Deed or of the implied obligations to act in good faith and not to undermine the relationship of confidence and trust.

[34] In relation to the latter implied obligations, I make clear my view that I do not consider such terms incorporated as implied terms of the Deed. I do not regard the Deed as a conventional employment relationship which incorporates the terms implied by common law. As such, no question of cancellation arises in relation to these terms.

[35] Nor do I consider the breach that I have found an essential term of the contract the breach of which entitles Hanover to cancel the contract.

### ***Speirs Finance Limited***

[36] Hanover next alleges Mr Finnigan acted in breach of his duty in relation to a limited liability company Speirs Finance Limited. I remain unconvinced that Hanover was actively considering the purchase of Speirs Finance Limited. Certainly no corroborative evidence of that fact was proffered in this investigation of that situation. The most that can be said is Mr Andrew Schmidt's evidence that Hanover "*has continued to have a watching brief on Speirs Finance Limited and it is still an opportunity Hanover is considering*". For that assertion no corroborative evidence is offered. I am not persuaded that is actually the situation.

[37] It is clear however, that in November 2004 Hanover elected not to purchase Speirs Finance Limited preferring instead to purchase another company. Having reached that view, I am unable to conclude Mr Finnigan took advantage of an opportunity that belonged to his employer. As I see it, Hanover had passed over the opportunity and there is nothing to suggest otherwise.

### **Board meetings**

[38] Next Hanover alleges that Mr Finnigan acted in breach of the Deed by refusing to attend board meetings on the basis that were his employment negotiations successful, he would be in a position of conflict. Hanover criticises Mr Finnigan for failing to provide information to Hanover to enable the potential conflict to be assessed. In plain terms, it means that Mr Finnigan should have told it he was going to Strategic Finance Limited.

[39] Hanover says Mr Finnigan acted in breach by refusing to attend Board meetings. I find no evidence of this allegation. On the contrary, I consider Mr Finnigan acted entirely appropriately given his negotiations for new employment, by declaring that fact and recognising it would be inappropriate for him to do so. In those circumstances, I find no breach by Mr Finnigan. I consider too, that any such breach would not be a breach of an essential term entitling Hanover to cancel the contract.

### **McKelvie Street**

[40] I am not persuaded that there is any evidence that Mr Finnigan was involved in a substantial property development at McKelvie Street, Auckland. There is no evidence that Mr Finnigan was engaged in development work at this site. Nor do I consider that this activity is properly regarded as a competitive activity.

[41] I accept that Mr Finnigan and Mr Hotchin had agreed that Mr Finnigan was permitted to sell the property, and I also accept that steps were being taken to sell the property. But I am not persuaded that Mr Finnigan's involvement in this activity was other than passive or that it was likely to adversely impact on his ability to discharge his obligations under clause 2 of the Deed. In that situation, the Deed anticipates the employer's consent will not be unreasonably withheld.

[42] Nor do I consider Mr Finnigan's involvement with this property as constituting a breach of an essential term of the Deed entitling Hanover to cancel the Deed. Accordingly, I find no breach of the Deed in respect of this allegation.

### **Affirmation of contract**

[43] By letter dated 29 September 2005, Mr Hotchin wrote to Mr Finnigan as follows:-

*Dear Kerry*

*We refer to the Deed of Settlement between us dated 12 May 2005.*

*Hanover considers you to be in breach of your obligations under the Deed - including without limitation your obligation, at clause 2.2(e) of the Deed, to "at all times act in the best interests of the Group" (we will elaborate in due course).*

*We need to take some legal advice and consider our options in relation to these breaches.*

*In the meantime, and given that you have elected also to resign as a director of all Hanover companies (which is also contrary to the terms of the Deed), it seems sensible that you go on garden leave, with immediate effect.*

*I would be grateful if you could do this, and remain away from the Group's business premises, until otherwise advised. Please return all keys and access cards for the premises.*

*Please note that we have retained your laptop in order to remove Group confidential information from it. It will be returned to you as soon as that process has been completed.*

[44] I agree with the applicant's submission that Hanover's actions after the advice above amounted to an affirmation.

[45] It was not until 9 December 2005 that Hanover sought to formally cancel the Deed. For some 5 – 6 weeks before that purported cancellation, Hanover placed Mr Finnigan on garden leave and continued to require him to observe the terms of the Deed including requiring him to comply with the restraint and perform his duties as an employee and director. The Deed remained on foot and Mr Finnigan was expected to comply with the terms of it up to 28 October 2005.

[46] Those circumstances in my view are sufficient to constitute an affirmation of the Deed. That being so, Hanover must be taken to have waived its legal rights in relation to the breaches of contract it alleges by Mr Finnigan. In terms of section 7(5) of the *Contractual Remedies Act 1979*, Hanover is not entitled to cancel the Deed in these circumstances.

[47] It should now be clear that in my view, none of the alleged breaches, whether established or not, are essential terms the breach of which would entitle Hanover to cancellation of the Deed.

[48] The Deed recited background details as follows:-

*A The Employee is employed as the Chief Executive Officer of the Employer pursuant to an employment agreement. The Employer is also a director of the Employer and several of its related companies.*

*B The Employee claims, and the Employer denies, that he has a personal grievance against the Employer, including claims for humiliation, loss of dignity, and injury to his feelings under section 123(c)(i) of the Employment Relations Act 2000 arising out of his employment with the Employer.*

*C The parties have agreed to finalise all matters arising out of the Employee's employment by the Employer and all matters arising out of the termination of that employment by entering into this Deed without admission of liability.*

*D The parties have obtained legal advice prior to entering into this Deed.*

[49] It is the recital C that demonstrates the benefit to Hanover of the terms of the Deed. Hanover purchased the resolution of Mr Finnigan's alleged personal grievance. That is what it gained out of the Deed. It did not primarily purchase his faithful service – it already had that because of its continuing employment relationship with him and all the attendant obligations of that relationship. The Deed secured the resolution of Mr Finnigan's alleged personal grievance and that was the essential quality of the Deed for Hanover.

## **Determination**

[50] I find that the Authority's jurisdiction in relation to the orders now sought by Mr Finnigan is conferred by section 161(1)(r) of the Employment Relations Act 2000 and as articulated by the Employment Court in *Kerr* above<sup>2</sup>.

[51] I conclude that Mr Finnigan did not act in breach of the terms of the Deed such that Hanover is permitted by law to cancel it. I find that Mr Finnigan is entitled to have the terms of the Deed enforced.

[52] Accordingly, I now determine that this employment relationship problem shall be resolved as follows:-

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<sup>2</sup> See specifically paragraphs [28] – [35].

- (i) **I order Hanover Group Limited to comply with clause 2.1 of the Deed and pay to Kerry Finnigan the gross sum of \$50,000.00 (being the minimum aggregate bonus specified therein);**
- (ii) **I order Hanover Group Limited to comply with clause 3.1(b) of the Deed by paying to Kerry Finnigan the gross sum of \$590,000.00;**
- (iii) **I order Hanover Group Limited to comply with clause 3.1(c) of the Deed and pay to Kerry Finnigan the sum of \$60,000.00;**
- (iv) **I order Hanover Group Limited to pay to Kerry Finnigan any outstanding salary, holiday pay (including long service leave) and reimbursable expenses. For the avoidance of any doubt, the payment for holiday pay shall take into account the payment of \$50,000.00 ordered at (i) above;**
- (v) **I order Hanover Group Limited to pay interest to Kerry Finnigan on the total sum of the above orders at the rate of 9% per annum as from 28 October 2005 until the date of payment.**

[53] **The above orders are to be obeyed within 14 days of the date of this Determination.**

[54] **In the event that the parties are unable to agree on the sum due at paragraph 46(iv) above, either party may make application in writing, no later than seven days after the date of this Determination, for further investigation by the Authority.**

## **Non-Publication**

[55] I made an interim non-publication order by consent of the parties. Hanover asks that the interim order now be made final.

[56] I agree that Mr Finnigan's evidence in his witness statement at paragraphs 4, 5, 16 and 17 ought not be published. I consider that it is in the interests of justice to order the same. The evidence set out at those paragraphs relates to extraneous matters which did not require any determination by the Authority. The allegations make statements about persons and entities who took no part in this investigation and are potentially damaging and harmful. It would be wrong in my view for such allegations to be published without any findings as to their veracity or any challenge or defence by the persons so affected. For these reasons, I consider it just and in the public interest that this evidence not be published. **Accordingly I order that the evidence given at paragraphs 4, 5, 16 and 17 of Kerry Finnigan's witness statement dated December 2005 not be published.**

[57] I am also asked to order non-publication of the evidence given and gathered in this investigation relating to the limited liability companies Speirs Finance Limited and Landco. Again I consider it just and a proper exercise of my discretion to make such an order. The order is necessary so as not to interfere with any attendant commercial sensitivities which I am satisfied from the nature of the evidence exist. **Accordingly I order that the evidence given in relation to Speirs Finance Limited and Landco not be published.**

[58] I record Mr Finnigan's consent to these orders.

**Costs**

[59] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Finnigan's representatives are to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Hanover's representatives are to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson

**Member of Employment Relations Authority**