Employment Court of New Zealand

Hally Labels Limited v Powell [2011] NZEmpC 63 (13 June 2011)

Last Updated: 5 July 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 63

ARC 35/11

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

BETWEEN HALLY LABELS LIMITED Plaintiff

AND KEVIN POWELL Defendant

Hearing: 7, 8 and 10 June 2011 (Heard at Auckland)

Appearances: Chris Patterson and Shelley Kopu, counsel for plaintiff

Andrew Gallie, counsel for defendant

Judgment: 13 June 2011

Reasons: 16 June 2011

REASONS FOR JUDGMENT OF JUDGE B S TRAVIS

Introduction

[1] On 13 June 2011, I issued two declarations and a permanent injunction enforcing a restraint. These are my reasons for so doing although they were issued in draft form to the parties on 13 June 2011.

[2] In the hearing the plaintiff (Hally) sought to enforce a restraint preventing the defendant from being employed in any business in the adhesive label manufacturing industry within New Zealand or Australia. The hearing, which was set down as a matter of urgency, was limited to the plaintiff seeking a declaration that the purported cancellation of the restraint of trade by the defendant was invalid and the granting of both interim and permanent injunctions enforcing the restraint. The plaintiff also sought a declaration that the defendant had breached the terms of the

employment agreement between the parties by breaching the restraint of trade.

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[3] The plaintiff's proceedings against the defendant in this Court also seek declarations that the defendant has breached his obligations of confidence and his duties of fidelity and of good faith. Damages are to be sought if the plaintiff is successful. These are allegations which will, if necessary, be dealt with in a subsequent hearing. However, for reasons which I will give later, I ruled that the Court would determine the allegation that the defendant had breached the employment agreement by retaining confidential information and was thereby disentitled to cancel the restraint.

The proceedings

[4] Hally applied to the Employment Relations Authority on 30 March 2011 for remedies for the defendant's alleged breach of the restraint and sought an interim injunction to enforce it.

[5] The investigation meeting for the interim relief unfortunately did not take place until 2 May 2011 and the Authority issued a very prompt determination on 5

May declining the relief sought. This determination was challenged by the plaintiff and dismissed by me in an oral judgment issued on 13 May 20111.

[6] I found that there were a number of serious issues to be tried as to the reasonableness of the restraint and as to its enforceability. It was alleged that Hally had breached the agreement by not paying the consideration for the restraint as required and that the effect of this was that the defendant was entitled to rely on that failure as a defence to Hally's enforcement of the restraint and that such breach had entitled the defendant to cancel the agreement. There was a further issue as to whether the defendant was required to give notice to Hally of his intention to treat the contract as discharged for non fulfilment of the requirement to pay the agreed consideration within a reasonable time, before being able to exercise the right to cancel under the Contractual Remedies Act 1979. There was also an issue as to

whether the defendant had affirmed the contract and thereby lost the right to cancel.

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[7] At the time I heard the interim injunction challenge I was advised that the Authority would be investigating the substantive matter for two days commencing on 26 May 2011. The defendant had been employed since 28 March 2011 by Kiwi Labels Ltd (Kiwi), a division of the Geon Group Ltd (Geon), a competitor of Hally in the adhesive label industry. I was advised by the defendant that in the interim period he was not being employed to attack Hally's customer base but only in servicing existing clients of Geon and that he had undertaken to abide by the balance of the provisions of the employment agreement which dealt with the non-solicitation of Hally's clients and employees and obligations of confidentiality. For these and other reasons set out in my judgment, including delay on the part of Hally, I took the view that the balance of convenience favoured the continuation of the defendant's employment by Geon until the Authority could substantively investigate the matter.

[8] On 23 May 2011, Mr Patterson, counsel for Hally sought the leave of the Court to bring the matter of the interim injunction back before the Court on the basis of developments that had occurred since the issuing of my decision. Those developments included a successful application by Hally to the High Court at Christchurch for a search order against the defendant and Geon, which was issued on

20 May 2011 and executed on 23 May. Hally's application to this Court was opposed by Mr Gallie, counsel for the defendant, on the grounds that the circumstances disclosed in the affidavits filed in the High Court in support of the application for a search order did not undermine the implied undertaking the defendant had given the interim injunction proceedings and the claims in the High Court for relief against the defendant and Geon were not within the jurisdiction of this Court.

[9] In the meantime the parties had jointly applied to the Authority, under s 178 of the Employment Relations Act 2000, to have the substantive restraint proceedings removed to the Employment Court to be heard and determined without the Authority investigating the matter. This was based on the grounds that important questions of law were likely to arise in the matter to be investigated by the Authority, other than incidentally and which had been identified by the Court in its decision on the interim

injunction challenge. On 23 May the Authority issued a determination removing the substantive matter to the Court.2

[10] Counsel then agreed that rather than determine the disputed issue of whether or not the interim application should be re-opened, urgency should be granted to the substantive proceedings and on 24 May counsel agreed to a fixture for the substantive restraint issue, commencing on Tuesday 7 June, and continuing on to Friday 10 June.

[11] Initially it was contemplated that Hally would file and serve, by 27 May, a statement of claim including allegations of breaches of the employment agreement whether express or implied, in relation to confidentiality, competition or fidelity, in addition to the claim for enforcement of the restraint provisions. Such a statement of claim was filed and it alleged that in May 2011 Hally learned that between September and December 2010, and prior to his resignation, the defendant accessed and copied confidential information by accessing computer files and attaching USB devices to his laptop computer. These allegations have been denied.

[12] Against the objections of Hally, I ruled, on 2 June, that the defendant could not adequately prepare his defence to the extensive allegations now being made against him, as a result of the search of Hally's laptop which the defendant had used, as there were only effectively two working days left before the commencement of the hearing. I also found there was a very real risk that either the plaintiff or the defendant might wish to apply for a rehearing when additional information, particularly from Geon, as a result of the search order in the High Court, came to light. I found, therefore, that the allegations of breach of confidentiality, fidelity and good faith were not ready for hearing and that the issues of whether there was an enforceable restraint and whether it had been properly cancelled, were separate from any allegations of breach of confidentiality. I found that the issues which influenced me in declining the interim relief on the implied undertaking would

not be relevant in considering the substantive issues and whether a permanent injunction should be

granted. I considered the documents found as a result of the search could be relevant

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in considering whether the original restraint was justified to protect the plaintiff's

interests and, in particular, its confidential information.

[13] The plaintiff then applied for leave to file an amended statement of claim, which was opposed by the defendant. That opposed application was heard on 3

June. Mr Patterson argued that there was an important issue from Hally's perspective as to whether or not the defendant was in breach of the employment agreement at the time he purported to cancel the restraint provisions and that, if he was in such breach, this could deprive the defendant of the right to cancel. The issue of whether each of the documents relied on by Hally to establish the breach of confidence fell into the confidential category would have taken up more time for determination than the urgent fixture allowed.

[14] For this reason it was agreed that, for the purposes of the Court's enquiry into the enforceability of the restraint and to determine the issue relating to the legitimacy or otherwise of the defendant's cancellation, the documents alleged to have been in the possession of the defendant and located as a result of the search order were to be assumed to hold the status of confidential information belonging to Hally. That concession by the defendant was made for the limited purposes of the enquiry into the enforceability or otherwise of the restraint provision and is not to be taken as an admission as to the confidential nature of the documents in question outside the limited scope of the present hearing.

[15] On that basis I granted leave to amend the statement of claim. I directed that the evidence of the forensic examination of the computers should not at such short notice, be taken into account on the hearing on the enforceability of the restraint. I also ordered, on the application of Mr Patterson and without objection from Mr Gallie, that all the plaintiff's documents described as the —hard copy yield‖ from the High Court search order, contained in volume 5 of the documents filed on behalf of Hally, are to be regarded as confidential to the plaintiff and to be only available to the defendant and his counsel and not to any employee of Geon or to any other person other than the Court staff. On that basis the hearing into the enforceability of the restraint commenced on Tuesday 7 June 2011.

Non-disputed facts

[16] The following facts were not in dispute. The plaintiff is a privately owned adhesive labelling company, with over 45 years experience in Australasia. It has assets sufficient to support its undertaking as to damages. It develops, manufactures and supplies adhesive labels to a wide range of customers and has a strong market position in supplying labels to the meat, poultry and supermarket sectors. It has an in-house laboratory to assist in the research and development of products and their testing and trialling.

[17] The defendant joined a predecessor company of the defendant in 1989. After

2002 he became Market Manager, specialising in the meat and supermarket sectors and in developing relationships with existing and new customers until his appointment as Business Development Manager (New Zealand) in February 2010. Since 1 July 2002, the plaintiff was subject to restraints of trade obligations.

[18] On 11 May 2010 Hally and the defendant signed an employment agreement (the 2010 agreement), expressed to the effect on 1 February 2010, which contained the following relevant clauses:

9.0 Restraint on post-employment activities.

The parties recognise that the employer has a legitimate proprietary interest in the customers, procedures and practices of the company and agree to the following restraints in recognition of national status and seniority of the employee and the significance of those proprietary interests to the employer.

9.1 The Business Development manager will not, for a period of one year from the termination of his employment, directly or indirectly solicit or entice or attempt to solicit or entice any customer of the Company to place business with any competitor of the Company, nor will [he] aid or abet any other person to so solicit or entice any customer of the Company.

9.2 The Business Development Manager shall not at any time during the term of this employment, or for a period of twelve months after the termination of this employment, either on the his or own account or for any other person, firm, or company solicit, endeavour to entice away from or discourage from being employed by the Company, any person who shall at any time during the period of six months before the termination of this Agreement, have been an employee of the Company, without the express written consent of the Company.

9.3 During the term of this Agreement, and for the period of twelve months after the termination of this Agreement, the Business Development Manager shall not either on his own account or for any other person, firm or company, employ in any competitive capacity any other employee who was at any time for a period of six months proceeding termination of this Agreement, an employee of the Company without the express written consent of the Company.

9.4 The Company may within 7 days of giving or receiving notice of termination of the employment invoke the following sub-clause the consideration for which will be the making of a payment to Business Development Manager in the sum of six months base salary:

9.4.1 The Business Development Manager shall not, for a period of 12 months after the termination of this agreement (for whatever reason); carry on, be connected, engaged or interested, either directly or indirectly or alone with any other person or persons, (whether as Principal, Partner, Agent, Director, Shareholder, Employee, or otherwise), in any business in the adhesive label manufacturing industry, within New Zealand or Australia, that is in competition, either directly or indirectly, with the Company.

10.0 Confidentiality

10.1 In this clause, and for the purposes of this Agreement, —*confidential information*‘ means any information relating to the Business or financial affairs of the company which has come to the knowledge of the Business Development Manager or which has been disclosed or might reasonably be understood to have been disclosed to the Company in confidence, other than information that is already public knowledge or which is obvious or trivial.

10.2 Without limiting the generality of the foregoing, —*confidential information*‖ shall also include:

- any trade or business secrets, customer information, specialist know- how or practices in the industry or in any other industry in which the Company may from time to time engage in business; customer lists, customer requirements, performance reports, or profitability figures or reports;

- information pertaining to any other employee or customer of the

Company that is protected from disclosure under the Privacy Act

1993.

10.3 the Business Development Manager shall, during the continuance of his employment, and after its termination (from whatever cause):

- use the Business Development Manager‘s best endeavours to

prevent the disclosure of any confidential information;

- not disclose any confidential information other than to who has a proper need to know the confidential information, and who has been authorised by of the Company to receive the confidential information in question;

- not use any confidential information to the Business Development Manager‘s own benefit (whether direct or indirect) as distinct from the benefit of the Company;

- not use or attempt to use any confidential information in any manner that may injure or cause loss, whether directly or indirectly, to the Company; and

- not turn or attempt to turn the Business Development Manager‘s personal knowledge of any confidential information to his personal benefit as distinct from the benefit of the Company.

[19] On either 8 or 9 October 2010 the defendant was approached by senior employees of the Geon group to see if he was interested in taking up a role with Kiwi. The parties met on 10 October and there were three or four other meetings, the final meeting being on 11 November when the defendant met with Guy Phillips, the current General Manager of Kiwi and Roger Kirwan, the previous general manager of Kiwi. Terms were discussed and on 5 December the defendant rang Mr Phillips and advised him that he accepted Geon‘s offer. That offer was confirmed by a letter from Geon dated 6 December 2010, and was expressed to be subject to there being no restraint of trade obligations on the defendant‘s part, with a commencement date between 1 February and 30 June 2011. That letter included the form of the individual employment agreement being offered by Geon to the defendant.

[20] On 7 December 2010 the defendant, by a telephone call to his manager, David Welch and confirmed by a subsequent email, resigned from his employment with Hally. He openly disclosed to Hally that he intended to take up employment at Geon.

[21] Immediately before the defendant submitted his resignation on 7 December he had attended a meeting with a major supplier of Hally‘s in which commercially sensitive information for the 2011 year was presented and discussed. After submitting his resignation, the defendant attempted to attend a monthly strategy meeting, until he was instructed by Hally‘s Chief Executive Officer, Trevor Kamins, not to attend because of his resignation. On 8 December Mr Welch contacted the defendant to arrange a meeting to discuss the restructuring and, I find, the handover of the clients. The defendant had already given his laptop to Hally‘s human

resources manager, Amanda Nottingham. The defendant was placed on garden leave through to the end date of his employment on 7 February 2011.

[22] At the meeting on 9 December, Ms Nottingham and Mr Welch discussed the defendant‘s role that he had been offered at Geon, at which point the defendant acknowledged that he understood the restraint of trade but sought to alter its terms. He sought a three month stand down, including the two month‘s notice period on which he was on garden leave. He requested two months to be paid and one month unpaid and —a fair and reasonable settlement‖. He was told that Hally would consider its position and get back to him. Mr Welch and the defendant spent approximately three hours going through the defendant‘s key account files in his office.

[23] On 13 December, by way of a letter, the plaintiff invoked the restraint of trade. The letter stated Hally would meet with the defendant to discuss the implications of this.

[24] Mr Gallie responded on 17 December by a letter in which he advised he had been instructed by the defendant to open up discussions relating to the restraint. He acknowledged that the defendant had accepted employment with Geon, which was in competition with Hally. He acknowledged that, as the provisions of clause 9.4.1 of the 2010 agreement currently stood, the defendant was prevented from commencing employment with Geon for a period of twelve months. He stated that the defendant‘s employment with Geon would not require the defendant to breach the balance of the restraint provisions contained in clauses 9.1 to 9.3 (the non-solicitation of customers and staff) or clause 10 (confidentiality) and that the defendant had no wish to act in any way that would either harm the interests of Hally or otherwise constitute a breach of the restraint and confidentiality provisions. It set out the advice that had been given to the defendant that, subject to the Court‘s view on enforceability, he could be liable to injunctive remedies, if he was to breach the restraint or confidentiality provisions but that the provisions of 9.4.1 were prima facie unenforceable unless they could be shown to be reasonable in the interests of the parties and the public. He observed that the existence of a confidentiality provision was influential on the issue of whether it was, in itself, adequate protection without a

restraint and that the Court had stated that it is exceptional for a restraint of one year‘s duration to be found to be reasonable. It set out the factors that were likely to have influence in the defendant‘s favour were the restraint to be tested and repeated that the defendant had no intention of actively harming the commercial interests of Hally or to act in a way that would detract from his good relationship with the company or its personnel. It then stated:

The effect of the restraint provision contained in clause 9.4.1 and as it currently stands is, however, onerous. Whilst acknowledging that Mr Powell will receive payment in accordance with clause 9.4 he is effectively enjoined from deriving a livelihood for the next twelve months.‖

[25] Mr Gallie invited Hally to consider a reduction in the restraint from twelve to six months with payment reduced from six to three months base salary. He then stated:

Whilst we are loathe to start issuing threats in a letter of this nature, it must be said that unless agreement can be reached over these issues that Mr Powell would have very little option but to apply for a declaratory judgement with a view to establishing the correct limits of the restraint for enforceability purposes. We would appreciate you[r] advice as to the company‘s position as soon as possible.

[26] Hally responded on 28 December stating that they had instructed their lawyer to review Mr Gallie‘s letter of 17 December, that this was not possible prior to Christmas and the matter would be progressed after the holiday period. On

24 January Mr Patterson wrote to Mr Gallie stating that he had received instructions and expected to be in a position to provide a substantive response by the close of business next week. Mr Gallie responded on 7 February asking if they could expect Mr Patterson‘s response letter shortly.

[27] On 15 February Mr Patterson said that he had just returned from overseas, his draft letter was with his client for its approval and he hoped to have his letter to Mr Gallie by the close of business on the Thursday. He also apologised for the delay.

[28] On 18 February, Mr Patterson wrote to Mr Gallie again apologising for the delay, referring to the defendant‘s employment history with Hally and his access to confidential information. He expressed the view that the restraint was enforceable given the generous consideration paid for it, the defendant‘s seniority and the access

he had had to confidential information and key clients, during the course of his 22 years of employment. Mr Patterson acknowledged Mr Gallie's statements that the defendant had no intention of actively harming Hally's commercial interests but asserted that Hally had a contractual right to the restraint which it expected to be met. He referred to the confidentiality clause but submitted that it did not provide any more protection than the common law obligations of confidentiality that were owed in any event. His letter concluded:

Accordingly, in respect to your offer contained at paragraph 9 of your letter, I am instructed that it is rejected. My client may consider to agreeing to a variation of the restraint provided its commercial interests are adequately protected to its satisfaction and I invite you to put forward an alternative proposal for consideration by my client.

[29] Mr Gallie responded on 1 March stating that the defendant's proposal

—represented an extremely reasonable compromise and given the difficulties that your client will undoubtedly face if it were to seek to enforce the restraint given the extreme period of restraint and geographic area incorporated‖. It stated that the defendant was not able to table any additional proposals to those already set out and sought to have Hally reconsider its position. It concluded:

We note that it took some two months for your client to respond to the initial correspondence and this in itself is quite unsatisfactory given the need for Mr Powell to arrange his affairs and in light of the offer of employment. Time is now of the essence in terms of bringing this issue to a conclusion and to that end we shall need to hear back from you in response to this letter no later than close of business 8 March 2011.

[30] Mr Patterson responded on 9 March advising that the restraint was enforceable, maintaining Hally's rejection of the offer and that, should the defendant breach the terms of the restraint, all steps necessary to enforce it would be taken by Hally and reserving Hally's position against any one who aided or abetted that breach. It concluded:

I reiterate that my client may consider to agreeing to a variation of the restraint provided its commercial interests are adequately protected to its satisfaction. To that end, I invite you again to put forward an alternative proposal for consideration by my client.

[31] Mr Gallie responded to Mr Patterson on 10 March stating that clause 9.4 of

the agreement required the payment to the defendant of six months' base salary, that

the clause was invoked on 13 December and that, while time was not expressly stated to be of the essence, it was implicit that the payment would be made either upon the plaintiff invoking the subclause, or on or before the end of the employment, which was 7 February. The letter claimed that payment of the requisite consideration was an essential term, the failure to pay the consideration to the defendant constituted a breach of the restraint clause which substantially reduced the benefit and increased the burden of the agreement for the defendant and made the benefit and the burden of the agreement substantially different from that which was agreed upon. It concluded:

Mr Powell accordingly exercises his right to cancel the restraint agreement pursuant to s 7(3)[(b)] of the Contractual Remedies Act 1979, and to the effect that he no longer considers himself bound by the agreement.

[32] Mr Patterson responded by an email on Monday 14 March agreeing that there was no express time for payment in the agreement and stating that his client had decided to continue paying the defendant, as it had previously done, by monthly payments. He stated Hally did not accept the cancellation and reserved its position to take steps to enforce the restraint unless the plaintiff gave an undertaking to comply by 21 March.

[33] Mr Gallie replied on 18 March, maintaining the claim that the restraint agreement had been brought to an end, and rejecting a payment into the defendant's account overnight on 14 March of a sum equivalent to one half of one month's base salary. It stated that the defendant had subsequently spoken to Hally's pay administrator, who had advised the defendant that she had been instructed to make

12 consecutive monthly payments in the sum of one half of one month's base salary, the first payment being 14 March 2011.

[34] The letter asserted that the restraint agreement was quite clear in providing for the making of a payment in the sum of six months base salary and did not provide for the consideration for the restraint promise to be paid over a twelve month period. It also asserted that if payments could be made over a twelve month period the first would have been due on 14 February 2011 and the first payment was not made until 14 March and therefore amounted to a breach of the restraint agreement.

The defendant declined to give any undertaking and offered to return the payment. It concluded:

We confirm that Mr Powell has no intention of acting in breach of the balance of the provision of clause 9 of the agreement and which remain ext[a]nt notwithstanding the cancellation as relates to clause 9.4

[35] Mr Patterson responded on 23 March offering to have the balance of the restraint payment paid into his instructing solicitor‘s trust account, to be released when the defendant confirmed his acceptance of the terms of the restraint and revoked his purported cancellation. The letter also noted that the plaintiff had not received any notice of the proposed cancellation. Time for confirmation was extended until Thursday 24 March 2011. When no undertakings were received, Hally filed its application for interim relief in the Authority.

The disputed facts

[36] On 11 March the defendant advised Geon that he was free of his restraint and he commenced employment at Kiwi on 28 March. I find that at present the defendant works at Kiwi in the area of tying up existing clients and taking up opportunities for cross-selling of Geon Group products to those clients. He was employed to take over the role Mr Phillips previously had in servicing clients of Kiwi, a role Mr Philips could not continue following his promotion to the position of general manager.

[37] There is no evidence that Kiwi has engaged in any form of active campaigning against Hally‘s client base and I accept Mr Phillip‘s evidence that this is likely to be the position until well after 7 February next year when the defendant‘s obligations under the restraint, if it is enforceable, will have ended.

[38] As a result of the execution of the search order on the defendant‘s residence, a number of documents belonging to Hally, which are described as the —yield documents‖ were discovered. I have already noted the defendant‘s admission for the purpose of this particular proceeding that those documents hold the status of confidential information belonging to Hally.

[39] When the defendant was first asked questions about the yield documents he was asked whether, when he was instructing Mr Gallie to write the 17 December letter stating he had no wish to act in any way that would harm the interests of Hally or otherwise constitute a breach of the restraint and confidentiality provisions, he had turned his mind to whether he had retained any documents that belonged to Hally. He claimed he did not turn his mind to that. He was asked if he accepted that the documents that were recovered from his house could be used to harm Hally‘s interests and he responded that he did not believe they could harm Hally. When asked whether he thought he had a right to keep them when he was home on ‗garden leave‘ after having resigned he stated, —those documents as we have heard before were taken over a number of spanned over a number of years and as we have heard earlier were found in my office in various places and I was not aware that they were there when I left Hally‖. He was then asked again whether he accepted he had no right to possess the documents and he said, —I understand now that if it was Hally property it should have probably been returned. Some of those documents were not Hally property‖. The defendant was later questioned about his employment agreement with Geon which contained a confidentiality provision which included the statement that he could not remove or distribute any information, including customer supply or product information, from Geon‘s premises without Geon‘s consent. He was asked whether that had turned his mind to the obligations he might have had to Hally because he had received that agreement on 6 December. He claimed that he did not think of that at all and that he was unaware of what Hally documents he had at home and that it was not a case of wilful blindness on his part.

[40] The defendant had claimed that he had taken each of the documents out of his briefcase on various occasions because he did not need them for the next while and would leave them in his home office. He was asked whether each day when he was going to work at Hally‘s while these documents were sitting at his home office it had never crossed his mind that perhaps he should take them back and put them into their respective files in his office at Hally‘s. He responded:

A. No, no. I would have had electronic copies of them at work and depending on the date of them, some of these as well outdated, they probably wouldn‘t be required again for some time, if at all.

[41] When asked whether the day immediately after him removing the documents from his briefcase it would have been fresh in his mind that he had the documentation at home and that it would be prudent to take it into the office, he replied:

A. Some of these documents are quite old and relate back to 96, 99,

2011. There‘s a real mixed bag here and yes if I had something that I‘d taken yesterday it would probably be reasonable to assume that I‘d forgotten

it or left it there or should have known it was there. However, in all these

cases here they hadn‘t been used for quite some time.

[42] Because I do not wish to breach the suppression order I have made in respect of the yield documents I do not intend to canvass them in any detail or even to name the clients. I find, however, that, contrary to the defendant‘s assertion in evidence that the documentation was not current, the documents number 1-15 and 17 dealt with current contractual arrangements Hally had with key clients which were still current at the date of the hearing and others contained budgetary arrangements for

2011.

[43] One email, for example, relating to an important development for a key customer was dated 25 November 2010, only twelve days before the defendant's resignation. I also find, based on concessions made by the defendant and Mr Phillips in cross-examination and the evidence of the plaintiff that these documents would be of considerable assistance to a competitor such as Geon who would have a commercial interest in obtaining the clients referred to in the documentation. I accept that the documents were highly confidential to Hally and valuable to any person or entity intending to compete against it. Unauthorised use of the bulk of the yield documents by competitors would be harmful to Hally's commercial interests. The defendant's senior position at Hally, lengthy experience and extensive knowledge of a highly competitive trading area would have left him in no doubt about the danger of this documentation falling into a competitor's hands and I find his denial that they were potentially harmful also undermined his credibility.

[44] It is common ground that the documents contained confidential information which was readily available to the defendant during the course of his employment with Hally and which he would have been entitled to take home to work on in the

course of his employment. I also find that it was intended that such documentation should be returned to Hally's offices after its use at home, and that it should have been returned to Hally at the latest on the termination of the employment agreement. The defendant's explanation that he took these documents home from time to time in his briefcase, removed them and left them in his small home office and simply forgot to return them was difficult to accept. The defendant's credibility on this issue was undermined by his initial assertion that the documents were not current, even though he had had the opportunity to reconsider them after they had been found as a result of the search order and they clearly were current.

[45] Further, I find the defendant knew on 8 December that he was meeting with Mr Phillips the following day to hand over all his files while he was on ‗garden leave'. Several of the yield documents related to key accounts which were current and the meeting on 9 December would have reminded the defendant, if in fact he had forgotten they were in his position, that these documents should have been returned to form part of the files handed over on 9 December. His work diary should also have been dealt with in this manner.

[46] I find on balance that the documents were retained by the defendant in the full knowledge that he ought to have returned them and knowing that they could be of advantage to his new employer. The retention of those documents I find to be a breach of the implied duties of trust and confidence and fidelity.

[47] As to the allegation that the retention was also in breach of cl 10 of the 2010 agreement, I find that it is ―confidential information‖, as conceded by the defendant for the purpose of this hearing and that the defendant did not use his ―best endeavours to prevent the disclosure of any confidential information‖ as required by the first bullet point in clause 10.3. His best endeavours should have included removing the yield documents in volume 5 from his home office back to Hally's premises.

[48] I am not, however, satisfied, on the evidence at present, that the defendant disclosed any confidential information to any unauthorised person or used it for his own personal benefit, as distinct from the benefit of Hally, or used it in any manner

that could injure or cause loss directly or indirectly to Hally. I accept the force of Mr Patterson's submission that it is difficult to see what other use the defendant may have had for those documents and that they were unlikely to have been retained for nostalgic purposes. However, breach of the confidentiality provisions in cl 10.3 because of their seriousness required compelling evidence on balance which was not presented to the Court. There was some evidence that a client of Hally unexpectedly put a supply contract out for tender and that documents relating to this client were part of the yield documents but I am not satisfied that this raises more than a mere suspicion that the documentation was put to unlawful use by the defendant.

Legal issues

[49] The legal issues fall into two parts, the first is whether the restraint was properly cancelled. The second, if it was not properly cancelled, was the restraint reasonable and enforceable?

[50] To determine the first issue there are a number of sub-issues.

(a) Was there a failure on the part of the plaintiff to pay the consideration and did that constitute a breach of the restraint?

(b) Was the timing of the payment of the consideration an essential term of the restraint?

(c) Was notice required to be given by the defendant to the plaintiff prior to cancellation or alternatively did the non-payment of the contractually stipulated consideration meet the requirements of s7(4)(b) of the Contractual Remedies Act 1979 and therefore entitle the defendant to cancel?

(d) Did the defendant affirm or alternatively waive the breach? (e) Was the defendant estopped from cancelling?

(f) Was the defendant in breach of the restraint or of the employment agreement at the time of cancellation so as to vitiate his

cancellation?

[51] The provisions of s 7 of the Contractual Remedies Act, insofar as they are relevant provide:

7 Cancellation of contract

(1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.

...

(3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—

...

(b) A **[**term**]** in the contract is broken by another party to that contract; or

...

(4) Where ... subsection (3)(b) ... of this section applies, 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 or breach is, or, in the case of an anticipated 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.

(5) A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.

...

Failure to pay?

[52] Mr Gallie submitted the wording of cl 9.4 gave Hally a discretion, within 7 days of giving or receiving of notice of termination of employment, the right to invoke cl 9.4.1 —**the consideration for which will be** the making of **a payment** to the Business Development Manager in the sum of six months base salary‖ (emphasis added). He submitted that the making of a single payment at the point when the obligation to make it arose constituted not merely an obligation on the part of Hally, but the essential —consideration‖ for the restraint sought to be imposed. He submitted that if the restraint was unsupported by the contractually stipulated consideration it could not take effect or be enforced against the defendant.

[53] It is clear that the restraint clause is silent as to the timing of the payment. Mr Gallie submitted that on a true construction of cl 9.4 the time for payment was to be 13 December 2010, the time the restraint was invoked, or, in the alternative, and at the latest, on the commencement of the restraint period itself, on 7 February 2011. Because the plaintiff failed to pay at the time the payment fell due he contended Hally was therefore in breach.

[54] Mr Gallie submitted there was a direct causal connection between the point in time when the defendant began to perform his part of the bargain in relation to the restraint and the requirement for Hally to pay the consideration. The defendant was required to forgo his right to otherwise derive a livelihood in his profession and the exchange for this was the payment of the consideration, the one following the other,. He submitted the executory promise of Hally should at that time have been performed.

[55] Mr Gallie submitted that, in the alternative, the principles relating to the implication of terms were relevant as an aid to construction. He relied on the

—business efficacy test‖ referred to by the Court of Appeal in *Attorney-General v NZ Post Primary Teachers Association.*3 He submitted the implication of such a term as

to the time for payment would be reasonable and equitable, necessary to give

3 [1991] NZCA 206; [1992] 1 ERNZ 1163, [1992] 2 NZLR 209.

efficacy to the contract, be so obvious that it goes without saying, be capable of clear expression and did not contradict the express terms of the contract.

[56] Mr Patterson accepted that it was arguable that the consideration should have been paid at the time the restraint was invoked or at the time the employment relationship terminated between the parties. He said it was also arguable that the payment was to be made at the time the employee acknowledged being bound by the restraint or made demand for payment.

[57] I consider that in the absence of any express time in cl 9, by necessary implication the restraint was to take effect on or before the termination of the 2010 agreement, namely the expiry of the two month notice period, on 7 February. At that point in time a single payment of the consideration ought to have been made if the defendant had not indicated to Hally that he was not prepared to be bound by the restraint as written. This is a matter to which I will return.

[58] I accept Mr Gallie's submission that Hally was therefore not entitled to drip feed the payment over a 12 month period because the clause clearly contemplates —a payment‖ not twelve separate payments. I do not however, accept Mr Gallie's submission that the twelve months should run from the giving of the notice rather than from the termination of the employment. Clause 9.4.1 states that the twelve months is to run —after the termination of this agreement (for whatever reason)‖. The

2010 agreement was not terminated by the giving of the notice on 7 December. At that point the defendant still remained in employment, albeit on _garden leave', until the expiration of the two months on 7 February 2011. Had Hally purported to unilaterally shorten this period, the defendant could have claimed that he was

unjustifiably dismissed.4 In *Schilling v Kidd Barrett Ltd*5 the Court of Appeal held

that the employee having been paid wages throughout the period of notice, such payment being incidental to the relationship of master and servant, the contract of service with its implied term of good faith and fidelity remained in force throughout

that period, notwithstanding that the employee was on leave during the last week.

4 see *Coca Cola Amatil (NZ) Ltd v Kaczorowski* [1998] 1 ERNZ 264.

5 [1977] 1 NZLR 243 (CA).

[59] However, it does not follow from my finding that payment should have been made on or before 7 February that Hally was in breach of the agreement by not making payment at such time. The conclusion I have reached was on a construction of the agreement plus the implication of a term. The agreement itself was silent as to the precise time of payment and until this issue was resolved by the implication of a term, the precise time for payment would not necessarily have been known by Hally, in the absence of any one drawing that assertion to its notice.

[60] As Mr Patterson submitted, nowhere in the communications between the defendant and Hally did the defendant assert that he required payment by any particular time and certainly not by 7 February. Had he done so, then the defendant would have been on notice that a failure to pay at that time might constitute an arguable breach of the agreement based on the implied term. This is a matter which is analogous to and interrelated with Mr Patterson's main submission that notice was required to be given before cancellation could be invoked, a matter to which I will return.

[61] The other complication is that, although the implied term may provide the answer as to when the payment should be made, it does not, in the circumstances of this case, dispose of the issue of how much was to be paid in view of the defendant's assertion in the correspondence that the restraint was unreasonable as to time and should be reduced to no more than six months on the payment of three months base salary. As the correspondence from the defendant did not seek any other payment than three months base salary for a six months restraint, the failure of the defendant to pay six months base salary on 7 February therefore, did not constitute a breach of the restraint, notwithstanding the effect of the implied term.

Essential term?

[62] To determine the issue of whether payment of the consideration on time was an essential term of the agreement and thus a term for the purposes of s 7(4)(a) of the Contractual Remedies Act, being a term about which the parties had expressly or impliedly agreed that its performance was essential to the party exercising the right

to cancel, Mr Gallie cited *Mana Property Trustees Ltd v James Developments Ltd*6

where the Supreme Court stated:

[24] Subsection (4)(a) contemplates that the parties either have expressly agreed that a particular term in their contract is to be regarded as essential (to the cancelling party or to both of them) or must be taken to have impliedly so agreed. In both cases it is a matter of interpretation of the contract. The use of words such as —performance being essential‖ or —strict performance being required‖ would plainly fall within the former category, but no special form of words is necessary

provided that it can be seen that the parties have indeed agreed that adherence to the provision in question is being treated by them as essential. The latter category, of implied agreement on the essentiality of a term which appears in the contract, may sometimes be more difficult to establish. But, again, it will be a question of interpretation, that is, ascertaining the intention of the parties as to the essentiality of the particular term from its language read in the context of the whole of the contract and the surrounding circumstances when the contract was made. Of particular importance will be what must then have been in the contemplation of the parties concerning the likely effect of a breach of the term. It will include whether a term of the same kind has customarily been treated as a condition or as an essential term under the Act, such as, in relation to a land sale agreement, a requirement for payment of a deposit within a particular time. It will also include a consideration of the type of contract and whether it is one, like a mercantile contract, which normally requires strict performance. The court must ask itself whether, without expressly stating that the term is essential – that is, using a form of words equivalent to the expressions of which we have given instances – the parties can be seen, in context, to have intended that that should be the position. Obviously there will be some cases where what is express shades into what must be taken to be implied.

[25] In the end, the preferable approach is to ask whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contextual appraisal which disregards what a party may unilaterally have said about its intention in that regard.

(Footnotes omitted)

[63] Mr Gallie relied on his submissions that the payment by Hally was the essential consideration for the restraint, that the defendant had accepted a self imposed restraint from 7 February by not joining Geon then, but had not received any consideration for so acting. Because the timing of the payment was a term essential to give business efficacy and should thus be implied, he contended that also satisfied the requirement that the making of the consideration payment on time was a

term, the performance of which was essential to the defendant.

6 [2010] NZSC 90; [2010] 3 NZLR 805 (SC).

[64] Mr Patterson accepted that payment of the consideration for the restraint would be essential to the defendant but its timing was not. He submitted that there was no evidence that the time of the payment was essential to the defendant before he purported to cancel the restraint, as the first time the issue of payment was raised was in the letter purporting to cancel the restraint. He also relied on the *Mana Property* case where the Supreme Court found that, although the size of the land to be purchased was an essential term, the timing of the settlement of the sale and purchase was not and therefore could not be cancelled by the prospective purchaser without giving the vendor a reasonable time to remedy the situation by the giving of a settlement notice.

[65] In the absence of an equivalent notice from the defendant to Hally, Mr Patterson submitted that the timing of the payment was not an implied essential term which had been breached by Hally, albeit without knowing that the timing was to be regarded as essential.

[66] Had there been no communications between the parties which had put the timing and the amount of the payment at large, I would have been inclined to accept Mr Gallie‘s submission that, as it was necessary as a matter of business efficacy to imply a term as to the timing of the payment, the timing would also have been an essential term which would have been breached by Hally had it not paid the full six month‘s base salary on or before 7 February.

Was notice required to be given by the defendant prior to cancellation?

[67] Mr Gallie summarised the legal position as follows. Time will be not be considered to be of the essence unless:

(a) The parties expressly stipulate that the conditions as to time must be strictly complied with or;

(b) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence (*Mana Property*) or

(c) A party that has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

[68] Mr Gallie contended that the second situation was applicable to the facts of this case and the implied term showed that the timing of the payment was essential.

[69] Whilst I accept the timing of the payment was essential, by implication, because it was not expressed in the agreement, I consider that as a matter of equity and fairness this is a case in which notice should have been given by the defendant to Hally that the defendant was being subjected to unreasonable delays as to the timing of the payment and as to the amount.

[70] Mr Patterson submitted that the defendant was prevented from using non- payment as a ground for cancellation when he had not made timing of the payment to be of essence. He relied on the following statement in Burrows, Finn and Todd *Law of Contract in New Zealand*, referring to the case of *Hunt v Wilson*7at page 580:8

If the original contract specifies no time for completion the law implies that the time will be a reasonable time. However, the contract cannot be immediately discharged on the expiry of what the innocent party regards as a reasonable time: the innocent party must give notice requiring the other to complete within a further reasonable, but specified, time. The reason for this is that —it is undesirable that the rights of the parties should rest definitely and conclusively on the expiration of a reasonable time, a time notoriously difficult to predict‖.9 As Cooke J said, the requirement of notice

—makes for clarity and justice‖.10

[71] This passage relies on the statement of Cooke J, as he then was, in *Hunt v Wilson*, which was extensively discussed by the Supreme Court in the *Steele v Serepisos*11 case. Tipping J, in *Steele*, rejected the Court of Appeal's conclusion that it was not open to the vendors in that case —to cancel‖ the contract without having given the purchaser —fair notice‖ of their intention to do so and the —fair opportunity‖

to take steps to secure an easement over an adjoining neighbour which would have

7 [1978] 2 NZLR 261.

8 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at 580.

9 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 555 per Mason J.

10 *Hunt v Wilson* [1978] 2 NZLR 261 (CA) at 273.

11 [2006] NZSC 67, [2007] 1 NZLR 1 at [120].

allowed the sub-division, upon which the agreement was conditional, to proceed.12

He concluded that the vendors were not liable for breach of contract for having failed to give notice to the purchaser of their intention to treat the contract as discharged for non-fulfilment of the conditions. He found that such notice was not required by the terms of the contract itself and there was no proper or sufficient legal basis to require

such a notice in the absence of contractual entitlements.13 A similar result was

reached by Blanchard and Anderson JJ.14

[72] The lines of authority relied on for the requirement to give notice all came from the vendor and purchaser area, not from the lines of authority dealing with employment cases, where different considerations may apply.

[73] There have been cases where an employee is entitled to immediately resign as a result of the employer's breach without having to give any notice. For example in *Western Excavating (ECC) Ltd v Sharp*15 Lord Denning stated16:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. ... The employee is entitled in those circumstances to leave at the instant without giving any notice at all. ... But the conduct must ... be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

[74] Similarly an employer can dismiss an employee summarily, that is to say without any notice, if there is misconduct going to the root of the contract.17

[75] In the present case, hypothetically, had there been no communication from the defendant either at the meeting on 9 December, or at any later date through his

12 At [36].

13 At [70].

14 At [16] and [141] respectively.

15 [1977] EWCA Civ 2; [1978] ICR 221 cited to the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW etc* [1994] NZCA 250; [1994] 1 ERNZ 168, [1994] 2 NZLR 415 (CA).

16 At p 226.

17 See for example *Air New Zealand v Hudson* [2006] NZEmpC 46; [2006] ERNZ 415.

solicitors, indicating that he was challenging the reasonableness of the restraint and seeking a lesser period for a lesser consideration, and by 8 February Hally had not paid him the six months base salary, he would arguably have the right, based on the implied essentiality of the timing and amount of the payment, to have elected to cancel in reliance on s 7(4)(a) of the Contractual Remedies Act. Here, however, the matter has been complicated by the defendant's initial request at the 9 December meeting for a one month unpaid restraint following the paid two months notice, replaced by a formal offer in the letter of 17 December, and referenced in the 1

March letter, for the restraint to be reduced from twelve months to six months, the payment to be reduced down to three months base salary and for all the other provisions of clause 9.4.1 to remain unaltered. Those communications, which contained no indication that the timing of the payment, as opposed to clarification of the restraint period, was an essential aspect, put both the timing and the amount of the payment at large. The repeating of the offer on 1 March after the implied time for payment on 7 February had expired, supports that proposition.

[76] In those circumstances I accept Mr Patterson's submission that fairness and reasonableness, which underlies the general rule that in the absence of an express provision, notice must be given, applies in the present case. Notwithstanding the implication of the timing of the payment, I find that the defendant was therefore obliged, on receipt of Mr Patterson's letter of 9 March, to have made time of the essence for the payment of the consideration and to have expressed in that notice his acceptance of the twelve month restraint period. In the absence of such notice, Hally was not in breach and the defendant was not entitled to cancel under s7(4)(a).

[77] I reach the same conclusion in respect of the provisions of s7(4)(b) as to the effect of the alleged breach for the following reasons. First there was no breach. Second, I accept Mr Patterson's submissions based on the evidence that the benefit to the defendant of the delay in payment, if set at six months base salary for a twelve month restraint, would have been, as at the date of the purported cancellation only some $500. This did not substantially therefore reduce the benefit nor increase the burden to the defendant of any purported breach by Hally. The benefit or the burden of the contract was therefore not made substantially different from that which was contracted (s7(4)(b)(iii)).

[78] Further, this is all in the context of the defendant having put at large both the timing and the amount of the consideration by his request to have the restraint modified from twelve months to six months.

Affirmation or waiver?

[79] Mr Patterson submitted that the defendant through his solicitor's letter of 1

March 2011 continued to negotiate about the restraint in full knowledge that he had not yet been paid any consideration for it. He submitted that by his actions the defendant clearly affirmed the restraint and the provisions of s7(5) disentitle a party from cancelling the contract if, with the full knowledge of the breach, he has affirmed it. Mr Gallie submitted that there were no negotiations ongoing between the parties once the defendant's proposal for variation was rejected. He submitted that, as at 7 February 2011, the last date for payment of the consideration, the plaintiff had yet to even respond to the defendant's initial proposal for variation. He cited from the decision of the Court of Appeal in *New Zealand Railways*

Corporation v Fletcher Development and Construction Ltd that:18

Waiver in this context occurs when the party entitled to insist on strict compliance with provisions as to time leads the other party to understand or assume that such provisions will not be insisted upon. This may occur when the party otherwise entitled to insist on adherence to stipulations as to time does some act inconsistent with his continued insistence on strict compliance.

[80] In a similar context is the decision of the House of Lords in *Hughes v*

*Metropolitan Railway Co*19 where Lord Cairns stated20:

... but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

18 [1990] NZCA 41; [1990] 1 NZ ConvC 190,464 at 190,567.

19 [1876] UKLawRpCP 15; (1877) 2 AC 439.

20 At 448.

[81] This case was one of the —slender stream of authority‖, according to Cheshire and Fifoot on Contact, which had flowed

in equity and which Denning J, as he then was, tapped in *Central London Property Trust Ltd v Hightrees House Ltd*21 as the basis of the doctrine which has come to be known as promissory or equitable estoppel.

[82] Consistently with these statements is the approach of the Supreme Court in the recent decision *Ingram and Knee v Patcroft Properties Ltd.*22 As Mr Patterson submitted, there the Supreme Court confirmed that waiver excuses the other party's non-performance so that there is no breach by that party of which the repudiating party may take advantage under s 7 unless the repudiation is first retracted and amends made. The Court stated at para 39:

This appears to us to be a sensible construction of s7(1) which aligns it with the general principle that if one party expressly or impliedly indicates or represents to another that performance on the other's part is unnecessary or will be of no avail, and the other party relies upon that indication or representation, the first party is unable afterwards to complain of the non-performance.

[83] Mr Patterson referred to the 17 December letter, which states at cl 8: —Whilst acknowledging that Mr Powell will receive payment in accordance with cl 9.4...‖. He submitted that this confirmed that the defendant had not made immediate demand and the parties proceeded on the assumption that the consideration would be paid although the amount depended upon whether any alternative to the twelve month's restraint could be negotiated.

[84] I accept Mr Patterson's submissions that the defendant's communications clearly gave Hally the impression that it need not immediately make payment of the consideration for the restraint as the amount of the consideration for any alternative proposal was yet to be agreed. At no time did the defendant suggest that the timing of the payment was essential to him and he had also put the amount of the consideration at large. Those communications straddled the time for payment on 7

February and were still ongoing at the time that the defendant purported to cancel the

agreement. I also find they can be described as negotiations and Mr Patterson's

21 (1947) KB 130.

22 [2011] NZSC 49.

letter of 9 March had not closed the door on a possible variation. I find that the defendant's conduct both affirmed the contract and waived the essential requirement that six months base salary be paid on or about 7 February as a consideration for the defendant accepting a twelve month restraint.

Disentitlement to cancel because of breach of employment agreement

[85] The Supreme Court in *Ingram* also found that a cancelling party may not cancel the contract if that party is already in breach. It cited *Noble Investments v Keenan*23 in which Glazebrook J found that a party seeking to cancel a contract cannot do so if it would thereby benefit from its own wrong and that the common law rule requiring that a cancelling party be ready and willing to perform the contract in all material respects was to ensure that the party in question could not benefit from its own wrong. The Supreme Court found that s 7(1) does not change the common law position that an unretracted repudiation was an intimation that it was useless for

the innocent party to go to the trouble of incurring unnecessary expenditure in making preparations to perform. This was consistent with the Privy Council decision in *Hirst v Vousden.*24 The Privy Council found that a landlord was disentitled from cancelling a lease for a defendant's failure to pay rent because the landlord had earlier repudiated the agreement.

[86] Mr Patterson accepted that at the time of the purported cancellation Hally did not know that the defendant had retained its confidential information but contended that the retention of that information by the defendant disentitled him from cancelling the restraint as by the retention he had already repudiated the restraint and therefore breached at least the implied terms of the employment agreement. He cited *Fresh Prepared Ltd v De Jong*25 where the defendant had retained details of his employer's current pricing information with one of its customers and had later used that information to subsequently prepare a proposal for that same business.

Harrison J found that the information fell squarely within the category of pricing

information which Neil LJ described in *Faccenda Chicken Ltd v Fowler*[26] as matters

23 [2006] NZAR 594 (CA).

24 [2004] UKPC 24.

25 [2006] NZHC 656; (2006) 3 NZELR 370.

26 [1986] 1 All ER 617.

of great importance and highly confidential and that the wrongful retention was in breach of the implied contractual duty.

[87] Mr Patterson conceded that at this stage there is no evidence that the defendant did use the confidential information retained by him and that would be a distinguishing factor from the *Fresh Prepared Ltd* case.

[88] I accept Mr Patterson's submission that the breach of the implied terms of trust and confidence and fidelity and the express first provision of cl 10 as to the safekeeping of confidential information, disqualified the plaintiff from cancelling the contract because at that point he was not ready and willing to perform its terms. It is also arguable that he was not prepared and willing to perform the terms of the restraint at twelve months and that may also have amounted to disentitling conduct.

Was there a dispute?

[89] In addition to the matters I have already found which either collectively or individually deprived the defendant of the right to cancel the employment agreement there is another important consideration which would also have the same effect. It was held by the Court of Appeal in *Sky Network Television Ltd v Duncan*27 that where there is a bona fide dispute as to whether an employee has an obligation to work in a particular manner as directed by the employer, that issue should first be dealt with by way of the dispute resolution process referred to in the contract before the employer can assert that the disobedience of its order amounted to wilful

disobedience justifying dismissal. The Court of Appeal found that the common law position in relation to wilful disobedience needed to be read against the statutory regime of the Employment Contracts Act 1991 and the requirements of good faith and fair treatment.

[90] In the present case there was a bona fide dispute raised by the defendant as to whether the restraint was enforceable and in the first letter the defendant indicated an intention to seek a determination to clarify the issue. The 2010 employment

agreement, as required by the Employment Relations Act, contained a plain language

27 [1998] NZCA 246; [1998] 3 ERNZ 917.

explanation of the services available for the resolution of employment relationship problems, including disputes about the interpretation, application or operation of the employment agreement. Until that dispute had been resolved the rights of the parties were not clear, especially as restraints are prima facie illegal as a matter of public policy because they restrain competition. It was only once the extent and duration of the restraint and its enforceability was determined that the amount of consideration payable would also be determined. Until that dispute was resolved, I find that the defendant should not have taken the unilateral step of purporting to cancel the agreement for non-payment which had not even been mentioned in the correspondence. That, as a matter of equity and good conscience would also render the cancellation invalid.

Can part of a contract be cancelled?

[91] Because of my conclusion that the defendant did not have the right to cancel I do not have to address the difficult question of whether the defendant could have cancelled only the part of the 2010 agreement containing the restraint and remained bound by the balance of the agreement.

Enforceability of the restraint

[92] Mr Gallie correctly submitted that Hally had the burden of showing that the restraint provision was reasonable in all the circumstances and in the public interest: see *Herbert Morris Ltd v Saxelby.*28 In the employment context this has been interpreted as requiring the employer to have some proprietary right, whether in the form of a trade connection or trade secret, which the restraint is reasonable to protect. That reasonableness must be determined at the time the covenant was entered into: see *Gallagher Group v Walley.*29 In determining whether the restraint was reasonable the Court must have regard to the history of the employment, the nature of the interests being protected, the likely effect on the former employee taking up a position with a competitor, the likely effect on the employee of the covenant being enforced and any relevant considerations of public interest: see

*Radio Horowhenua Ltd v Bradley.*30 The public interest requires the clause to be no more than adequate protection for the employer in the circumstances.

[93] Mr Gallie submitted that the robust and comprehensive confidentiality in solicitation clauses in the 2010 agreement provided sufficient protection, that Hally has overstated its assertions as to the high degree of confidentiality of the proprietary interests to be protected and the length of the restraint was well in excess of what would be considered reasonable. No specific submissions were addressed to the geographical extent of the restraint or the work that it covered.

[94] These may be boiled down to three essential elements for consideration: the scope of the clause, that is what activities it seeks to restrict; the geographical area to which it applies, and its duration.

[95] As to the geographical extent, I have noted there has not been any direct complaint by the defendant as to the clause

covering Australia and New Zealand. Both Hally and Geon work in the adhesive label market in Australia and New Zealand and I accept Mr Patterson's submission that, on the evidence, without the restraint applying in Australia also, its value to Hally would be greatly reduced. This is especially so as both Hally and Geon are highly competitive in both countries. Since at least 2001 it is common to regard the whole of New Zealand as one market

for certain enterprises: see *Fletcher Aluminium Ltd v O'Sullivan,*31 and the extension

to Australia would in itself, be reasonable considering the activities of Geon let alone other competitors in the field.

[96] The specific activities sought to be restricted are limited to the adhesive label manufacturing industry. This reasonably narrowed the scope to those activities the defendant was directly engaged in while working for Hally. Again there is no direct attack on the description of the activities and I find they have been described in an appropriately narrow fashion to cover the interests sought to be protected.

[97] As to those proprietary interests, although Mr Gallie submitted that the defendant's evidence and that of Mr Phillips, suggested Hally was being overly concerned, Geon also recognises the need to protect its proprietary interests even thought it does not have an in-house laboratory engaged in research and development and the testing of products. I am satisfied from the evidence led on behalf of Hally and supported by the yield documents that Hally has a proprietary right in the nature of both trade connections and trade secrets for which the restraint was reasonably designed to protect. These included Hally's exclusive products, the producers and suppliers of that product, the alternative supply chain and product programme, the key suppliers, customers and personnel particularly in the meat and supermarket sectors, strategic planning material, costings and margin details, centralised buying programmes, production methods and trial programmes.

[98] I also accept Mr Patterson's submissions that the defendant himself appears to have previously acknowledged Hally's proprietary rights by accepting the validity of the first paragraphs of cl 9 which refer to Hally's legitimate proprietary interests in customers, procedures and practice. The defendant, by his own acknowledgment and from the documents found in his possession was clearly privy to all of these matters and it is frequently acknowledged that confidentiality clauses whether express or implied do not provide adequate protection against the dissemination of such material.

[99] The main issue challenged by the defendant was the duration of the restraint. I accept that twelve months is at the higher end of what has been found to be reasonable. For example in *Debtor Manager (NZ) Ltd v Quail*32 although a New Zealand wide restraint was not held to be unreasonable, twelve months for a relatively junior officer was held to be excessive and unreasonable and the Court declined to save the clause by amending it under s 8 of the Illegal Contracts Act

1970.

[100] By contrast, in the *Gallagher* case, a four year worldwide restraint was held to be unreasonable and was reduced to one year. In *Cooney v Welsh*33 a lawyer

employed in the plaintiff's firm for some eight years was restrained from acting for people he had previously acted for while an employee, for a period of two years.

[101] The defendant held a senior position in May 2010 when he signed the 2010 agreement and had worked for 22 years for Hally. He had substantial bargaining power and took no objection to the restraint at the time the 2010 agreement was entered into. I also accept the plaintiff's evidence that the defendant was one of its key personnel in establishing and developing its business and in the trialling of alternative products for the plaintiff, which trials could take at least 12 months to complete.

[102] Finally I take into account the consideration that Hally was prepared to pay for the restraint. The Court of Appeal has held that where a restraint exists in a contract from the outset, the consideration is to be found in the mutual exchange of promises and no extra consideration or premium is required: see *Fuel Espresso Ltd v*

*Hsieh.*34 Here, however, there is separate consideration being offered for the

restraint. This also satisfies the requirement for such additional consideration if the

2010 agreement is viewed as a variation of a previous restraint: see *MA Watson Electrical v Kelling*.35 Hally was agreeing to pay half of the defendant's annual base salary for the twelve month period of the restraint. There was nothing to prevent the defendant from obtaining employment in any other trade or business and the evidence of Mr Welch as to alternative jobs available was not challenged to any serious extent. I also take into account the defendant's willingness to be bound for six months. In all these circumstances I conclude that the duration of the restraint was not unreasonable, or more than was necessary, in the circumstances.

Equitable remedies under the springboard doctrine.

[103] Mr Patterson submitted that the —springboard doctrine‖ or the —head start‖ advantage derived from the equitable duty of good faith, operated to disable the possessor of confidential information from achieving an unfair start and this had

been approved in a number of New Zealand cases, including *Schilling* and *BDM Grange Ltd v Parker*36 where Priestley J stated:37

The theme running through these decisions can be broadly summarised as a marked reluctance on the part of the Courts to allow a party who in breach of an employment contract or some other fiduciary relationship to profit from that. ... Courts tend to be vigilant in ensuring, where there has been a serious breach of the type I have described, that down stream benefits do not flow to a party as a result of that party's unlawfulness.

[104] Mr Patterson submitted that because of the wrongful retention of Hally's confidential information with an intent to use it for the benefit of his new employer, and taking into account the work the defendant has already performed for Geon, the restraint should be extended for a further six months in addition to the original twelve months.

[105] I accept Mr Gallie's submission that there is a serious question as to whether the Court has any power to extend the duration of a restraint as opposed to the power to modify it downwards under s 8 of the Illegal Contracts Act. Further there is no direct evidence the defendant retained the documents to benefit Geon. I therefore decline to extend the period of the restraint beyond that which the parties agreed in May 2010.

[106] I also found that the consideration for the restraint should be reduced pro-rata for the remainder of the term, a proposition both parties seemed to accept. In the draft of these reasons issued on Monday 13 June 2011, I directed that the consideration should be paid in one lump sum on the restraint becoming effective which I assumed would be on Tuesday 14 June 2011.

[107] I also directed that should there be any questions concerning the wording of the declarations and injunctions, which were based on the relief sought in the amended statement of claim, or as to when the injunction became effective, or the amount of the consideration to be paid, leave was reserved to apply for further

directions. No such application has been made as at the date of this issue of this judgment.

[108] Costs are reserved.

B S Travis

Judge

Judgment signed at 3.30pm on 16 June 2011
