

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 146  
5353268

BETWEEN                      MULTI MEDIA  
    COMMUNICATIONS LIMITED  
    Applicant

AND                                PHILIP OWEN McCLINTOCK  
    Respondent

Member of Authority:        M B Loftus

Representatives:              Michael Singleton, Counsel for Applicant  
    Penny Shaw, Counsel for Respondent

Investigation Meeting:        5 September 2011 at Christchurch

Submissions Received        At the investigation

Determination:                29 September 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Multi Media Communications Limited (MMC) seeks interim relief to enforce a restraint of trade provision it has in a written employment agreement dated 23 April 2007 with Philip McClintock.

[2]     In support of the application, the Authority received an original affidavit, along with a subsequent affidavit in reply, from a director of MMC, Mr Michael Gardiner.

[3]     The opposing position was supported by an affidavit from Mr McClintock, along with one from Mr David Boivin, a senior manager with the company for whom Mr McClintock now works, Christchurch City Networks Limited (t/a Enable).

## Background

[4] MMC is a Christchurch-based company specialising in large scale fibre optic and data network projects. It employs approximately 40 staff to design, build and manage fibre infrastructure projects nationwide.

[5] Mr Gardiner says:

*MMC has spent considerable time and money investing and developing the latest technology in cable insertion techniques. In particular, it was the first company in New Zealand to significantly embrace and develop Air Blown Fibre (ABF) technology. As a result, MMC has particular knowledge of, and experience in, ABF cabling and micro-cabling systems. These techniques have revolutionised the way Fibre Optic Cable is installed in New Zealand.*

[6] Mr McClintock was employed by MMC as a lead technician and commenced in May 2007. His previous employment had been as a fibre technician with Downers where, he says, he had access to top quality equipment and training and, in 2000, completed a course on ABF technology. A copy of the appropriate certificate was provided to the Authority. He says that he was lured to MMC with the promise of a managerial role but claims that such a role never eventuated; that he only ever attended one management meeting and was never privy to sensitive commercial information. These claims are disputed by MMC.

[7] Prior to commencement, Mr McClintock signed an employment agreement. Contained therein is a restraint of trade provision which reads:

### 12. NON SOLICITATION/RESTRAINT

12.1 *The Employee agrees that upon termination of this contract (for whatever reason) for a period of 6 months he will not solicit or approach, or accept approaches from any known customers, clients or employees of the Employer who have been customers, clients or employees of the employer in the period of 2 years preceding termination.*

12.2 *The Employee agrees that upon termination of this contract (for whatever reason) for a period of 6 months he will not in person or by any agent or nominee carry on business on his own account or contract to, or be employed in any capacity by any business that offers the same services relating to the installation of Fibre or ABF cabling systems or related or similar technologies within the geographic area of Christchurch, or otherwise within a radius of 10 kilometres of the site of one of the employer's business centres in New Zealand without the employers consent.*

*12.3 The employee acknowledges that the restrictive covenants provided in this agreement are given to the employer in consideration of the offer of employment.*

[8] The previous clause, 11, deals with confidential information. It requires that Mr McClintock neither use nor disclose any confidential information that he may gain in the course of employment, either during it or after its cessation.

[9] During his last five months with MMC, Mr McClintock says he was working at Enables' premises. Enable is a Council controlled organisation and a wholly owned subsidiary of Christchurch City Holdings Limited which operates, and is responsible for, the installation of Christchurch's optical fibre network.

[10] MMC originally had a contract with Enable for the design, build and maintenance of fibre optic cabling within Christchurch. In January 2009, the design service was removed from the contract and subsequently performed by Enable, though Mr Gardiner claims:

*Despite design services being removed from the main contract, MMC has continued to provide design services to Enable by locating two of its employees, including the Respondent, at Enable's offices in Christchurch.*

[11] Mr Gardiner goes on to say that the work performed by those employees is highly specialised in that it requires interface with other networks and information that is not readily available in the public domain. It is claimed that MMC is one of a limited number of companies with the necessary expertise.

[12] Enable has now been awarded the contract to construct the government backed fibre network in Canterbury. This will see some 180,000 premises connected by an installation of 3.5 million metres of cable. MMC states that good design is critical to the success of that project and that the employees it placed at Enable's offices assisted in the provision of that design as Enable's staff did not have the capability.

[13] Mr McClintock disputes that assertion and states that he was simply performing work that Enable would normally have conducted in-house but had found itself unable to do due to unmanageable volumes that had resulted from the February earthquake.

[14] Mr McClintock states that workload was diminishing and his time at Enable was clearly coming to an end, yet he had had no advise from MMC as to what it intended him doing next. He says this left him concerned about the future and he therefore accepted an offer from Enable, especially as it also offered the enhanced career prospects he had originally sought with MMC and which, he says, were denied.

[15] He advised MMC of his resignation on 7 July and on 8 August commenced with Enable as a development specialist. The required tasks are, in the view of Mr Boivan, quite distinct from anything that may have been provided by MMC.

[16] Since the resignation, MMC has been attempting to dissuade Mr McClintock from continuing in his new position by reminding him of what it contends are contractual obligations between himself and MMC that preclude him being able to take the role.

### **Submissions**

[17] Though expressed in slightly different ways, Mr Singleton and Ms Shaw were essentially in agreement as to the issues the Authority had to determine to ascertain whether or not there should be a grant of relief. The Authority is required to determine:

- (a) Is there an arguable case for permanent relief;
- (b) Is there no other adequate remedy;
- (c) Where does the balance of convenience lie; and
- (d) What does the overall justice require?

[18] For MMC it is submitted that there is a serious question to be tried given an extant restraint provision that Mr McClintock acknowledged as reasonable at the time of signing the employment agreement. It was also submitted, through evidence from the bar, that the restraint's geographic spread is limited and its length is not unreasonable.

[19] Mr Singleton then addresses what he submits will be the key issue, namely whether or not MMC has a proprietary interest that requires protection. Obviously, it is submitted that it does, with reference to information about ABF design technology,

processes, methodologies and other technicalities MMC has developed and which Mr McClintock could not have obtained or accessed but for his employment with the company.

[20] It is argued that damages would not be an adequate remedy given they would be extremely difficult to quantify and, from MMC's perspective, the real issue is the protection of information which, if disclosed, would potentially cause MMC significant economic loss and disadvantage. It is argued that having Mr McClintock remain in the industry increases the chance of such disclosure, even if inadvertently.

[21] The issues of balance of convenience and overall justice are addressed together. Obviously, it is argued that these favour MMC which is, it is submitted, a small to medium sized enterprise entitled to take all reasonable steps to protect its trade secrets and confidential information as a failure to do so would mean an inability to exploit its property rights in that information. It is submitted Mr McClintock made a conscious decision to leave its employment *in the face of a clear contractual provision* and, in doing so, committed a prima facie breach of his employment agreement for which he should suffer the consequences.

[22] It is also noted that Enable is a large organisation with a significant number of employees and resources. It should not, therefore, suffer any hardship but even if it did, it also had obligations to MMC through a non-solicitation agreement between the two companies. It is inferred, but not stated, that Enable should also abide by its agreements.

[23] For Mr McClintock it is argued that the provisions of clause 12 can not apply given the present circumstances. It is submitted that clause 12.1 is a non-solicitation provision and that Mr McClintock's activities cannot constitute a breach thereof. It is then argued that clause 12.2 precludes employment in a business that *offers the same services relating to the installation of fibre or ABF cabling systems* as MMC. Enable, it is submitted, is not such a business.

[24] In the absence of that argument's success, it is submitted that there is no arguable case given a lack of proprietary interest and a restraint that is unreasonable given that it contravenes Mr McClintock's right to work given that the scope claimed effectively precludes Mr McClintock from performing any work in his field of expertise. It therefore goes far beyond the requirement that such clauses *be no more*

than adequate protection for the employer in the circumstances (*Hally Labels v. Powell* [2011] NZEMPC 63) and, in any event, the balance of convenience favours Mr McClintock as MMC will suffer no loss as the work being performed for Enable had come to an end; there is no risk to confidential information and even if there was, damage is quantifiable and would be an adequate remedy. Conversely:

*The relevant inconvenience to Mr McClintock is substantial; he would be without work and income which he needs to meet expenses and it could aggravate his health problems.*

[25] Finally, it is submitted, there is evidence that third parties, including the general public, could be adversely impacted.

### **Determination**

[26] The starting point is that a covenant in restraint of trade is, prima facie, unenforceable but it can be upheld if reasonably necessary to protect proprietary interests of the former employer and is in the public interest (*Gallagher Group Ltd v. Walley* [1999] 1 ERNZ 490).

[27] The Authority is initially required to consider whether the restraint of trade was reasonably necessary to protect a proprietary interest or is it simply to limit competition and, secondly, whether the duration, geographical area and scope of the restraint of trade covenant is reasonable.

[28] Initially, however, I should address counsel's argument that clause 12 is not applicable in the present circumstances. The argument that clause 12.1 does not apply was advanced on the grounds that it is a non-solicitation provision but the argument was not explained or expanded upon. An examination of various dictionaries suggest that the concept of solicitation, whilst broad, has a special applicability to attempts to procure business. That is clearly not what Mr McClintock was doing, at least in the sense of attempting to lure clients and work from his previous employer to his new one. On the other hand, the clause expressly precludes Mr McClintock from accepting approaches from any known customer or client. Enable clearly fulfils the criteria of having been a customer or client of MMC and, equally clearly, Mr McClintock accepted its approach, namely an offer of employment.

[29] Therefore, and in the absence of a detailed analysis and submission on this issue, I must conclude that there remains an arguable case in this respect.

[30] Likewise, there is debate as to whether or not clause 12.2 is applicable. It precludes Mr McClintock from accepting employment in any capacity by any business that offers the same services relating to the installation of fibre or ABF cabling systems. The submission is that Enable is not such a business, but I find myself unable to concur on the evidence before me. Whilst the evidence proffered on Mr McClintock's behalf is that the work he now performs for Enable is quite different from that he performed whilst at MMC and, I note, that evidence is not contested by MMC, it does not go to the extent of advising the complete range of functions performed by MMC.

[31] I am not, therefore, able to conclude whether or not there is an element of potential competition and therefore whether or not the clause may have some applicability. Again, there is an extant argument.

[32] Turning now to what both counsel agree is the crucial issue – namely whether or not MMC has a proprietary interest requiring protection. It is MMC's contention that it has a proprietary interest in confidential information relating to ABF design technology, processes, methodologies and other technical information that it has developed. In this respect, reference is made to the fact that while each and every technical solution is unique, MMC has options that may be included and which are not offered by competitors.

[33] Opposing this is Mr McClintock's evidence that he was not privy to such information and, prior to his secondment to Enable, worked as a technician using equipment freely available on the market and used by applying skills in ABF installation that he had acquired with a previous employer (Downer) some years earlier. Here reference is made to *Green v. TransPacific Industries Group (NZ) Ltd* [2011] NZEMPC 6 where it is observed that knowledge and skills acquired during employment cannot generally be prohibited from being exercised by a former employee. Skills, and indeed much knowledge, are not the property of the former employer.

[34] In respect of proprietary interest, Ms Shaw submits:

*17. In his first affidavit Michael Gardiner did not identify any proprietary interest that needed protection; he referred only to the Applicants "specialist design skills" (paragraph 27). Mr McClintock's specialist skills and knowledge are not something capable of protection. MMC has no proprietary interest in them.*

...

20. *In his second affidavit the Respondent attempts to try and identify a proprietary interest. However the equipment used to carry out the work is owned by the Respondent and continues to be so, accordingly any technology, or processes required to operate that equipment will be controlled by the Respondent, presumably using their own staff or subcontractor to their business. The equipment, technology and process themselves are readily available to purchase and the Respondent cannot claim a proprietary interest in these.*

[35] I have some sympathy with this submission which is, in my view, supported by the evidence (or more correctly, the lack there-of). Indeed, I left the investigation meeting somewhat perplexed about the nature and extent of the proprietary interest MMC was seeking to protect, but therein lies a problem. This is an interim application supported by untested affidavit evidence. Whilst that evidence leaves me far from convinced that a proprietary interest exists, that does not mean that it does not, and that further pertinent evidence may be introduced in a substantive hearing. Albeit apparently weak, there must therefore be an arguable case.

[36] Similarly there are issues with the geographic spread of the restraint. On one hand, Mr Gardiner's evidence is that MMC operates nationwide, whilst on the other hand, I am advised, albeit from the Bar, that MMC's operations are essentially limited to the Canterbury region. One may be reasonable, the other not. But in the absence of clarity about the exact geographic extent of MMC's operations, it is, once again, difficult to reach a conclusion about the reasonableness of the constraint. Likewise, there are issues about the time for which it applies. On one hand, six months may seem quite reasonable, but on the other, there is evidence that the technology MMC wishes to protect may be rapidly overtaken by the passage of time thus rendering the period excessive.

[37] The last element in the debate as to whether or not the restraint is reasonable is the question of adequacy of consideration (*Fuel Espresso v. Hsieh* [2007] 2 NZER 651 (CA)). In this case, there is no evidence of consideration other than the job itself – indeed that is expressly stated in clause 12.3. The consideration's adequacy must therefore be questionable.

[38] There is then, and assuming a finding in favour of MMC, the issue of possible remedies. For MMC, it is argued that the restraint is reasonable, particularly in light of the comments in the Court of Appeal that "*agreements are made to be kept*" (*Fuel Espresso Ltd*). MMC is a small to medium sized enterprise and is entitled to take all

reasonable steps to protect its trade secrets and confidential information. If it does not, it will lose the ability to exploit its property rights in that information.

[39] On the other hand, it is argued for Mr McClintock that:

*The Applicant will suffer no loss if the injunction is not granted. The work the Respondent was undertaking had come to an end and there is no risk to any confidential information. Even if there was damage in this case it would be quantifiable. Although denied by Enable the Applicant is asserting that Mr McClintock would still be contracted from MMC and therefore earning income for MMC. If they were able to prove this at a substantive hearing, the loss is easily quantifiable, and damages would be adequate.*

[40] My earlier conclusion that MMC's argument is weak given what I consider an inadequate description of the proprietary interest leaves me unable to conclude there is no alternate remedy.

### **Conclusion**

[41] On one hand I have sparse information about the proprietary interest MMC is seeking to protect which has led to my earlier conclusion that its case, whilst arguable, is weak. On the other hand, there is evidence that Mr McClintock would suffer substantial inconvenience should the application be granted; he would be without work and income which would mean he is unable to meet expenses and it could aggravate extant health problems.

[42] In such circumstances I have no qualms in concluding that the balance of convenience and overall justice favour Mr McClintock. The application for interim relief, therefore, fails.

### **Costs**

[43] I reserve the issue of costs. I ask that the parties try to resolve the issue but, failing that, and in the event Mr McClintock wishes to seek costs, he is required to lodge and serve an application within 28 days of this determination. MMC is to file any response within 14 days of the application.