Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 93/08
5127862

	BETWEEN	PGG WRIGHTON LTD Applicant
	AND	BRENT JARY Respondent

Member of Authority:	Philip Cheyne
Representatives:	David Robinson, Counsel for Applicant Jane Costigan, Counsel for Respondent
Investigation Meeting:	27 June 2008 at Christchurch
Submissions received:	1 July from the Applicant and the Respondent
Determination:	3 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Woodhams Store Limited (previously Woodhams Woolstore Limited) owned a wool business and employed Brent Jary as a wool buyer. Woodhams sold its business to PGG Wrightson Limited who offered to employ Mr Jary. Mr Jary declined PGG's offer and instead has joined a competitor called Mainland Wool Limited, having been dismissed as redundant by Woodhams.

[2] By lodging its statement of problem, PGG seeks to enforce against Mr Jary the restraint of trade provisions in the employment agreement between him and Woodhams. PGG seeks an order in the nature of an injunction and damages against Mr Jary, and further seeks an interim injunction pending resolution of the substantive problem. The matter has been accorded urgency and this determination resolves the

claim for an interim injunction. As is usual it has proceeded by way of untested affidavit evidence. Final findings of fact will have to wait until the evidence can be fully tested so the conclusions expressed here are solely for the purpose of resolving the claim for an interim injunction.

Mr Jary's employment with Woodhams

[3] Mr Jary worked for Woodhams for many years, most of them as a wool buyer. There is a signed written employment agreement dated December 2002. It includes non-solicitation and restraint of trade clauses as follows:

> ***42 Non Solicitation***
>
> *42.1*
>
> *The employee shall not at any time during the period of employment or for a period of six months after termination of employment, for whatever reason, either on the Employee's own account or for any other person, firm, organisation or company, solicit, endeavour to entice away from or discourage from being employed by the Employer, any other employee or actual client / customer or prospective client / customer of the Employer.*
>
> ***43 Restraint of Trade***
>
> *43.1*
>
> *Employees shall not at any time during the term of this agreement and for a period of twelve months after the termination of employment with the employer establish, purchase, or obtain an interest in, either directly or indirectly any business in relation in any way to the Employer within a radius of 50 kilometres, without the express written consent of the Employer, provided that such consent shall not be unreasonably withheld.*
>
> *43.2*
>
> *Should this clause be held invalid for any reason, the reminder of the agreement shall continue in force and effect as if the invalid provision had been deleted, provided however that the parties to this agreement may*

negotiate a valid and enforceable provision in replacement of the invalid provision.

[4] Mr Jary was one of two wool buyers for Woodhams. He travelled to meet farmer clients to negotiate the purchase of their wool and he operated with considerable independence. Many clients' dealings with Woodhams were only through Mr Jary. Clients could sell wool to other companies as well and there is evidence that some did. It is safe to infer that Mr Jary was trusted by clients as he performed this work for over twenty years.

[5] Mr Jary's last day at Woodhams was 21 May 2008. That morning he was suspended and on Friday 23 May he received a letter from Woodhams giving him two weeks notice of dismissal due to redundancy. Mr Jary was not required to work out the notice period and his employment with Woodhams ended on 5 June 2008.

Sale of the business

[6] Mr Jary first heard in about July or August last year that Woodhams was selling its business, then in November he was told that the business was being sold to PGG who would take on all existing employees.

[7] There is a sale agreement dated 16 May 2008. One of the conditions subsequent is the purchaser (PGG) entering into an employment contract with Brent Jary on terms satisfactory to the purchaser. PGG waived that condition the same day *strictly on the basis that [Woodhams] has agreed to make all best endeavours to procure Brent Jary to enter into an employment contract …and preserve the existing goodwill of the business from competition which Brent Jary may otherwise present….* In correspondence dated 19 May 2008 Woodhams' solicitor says that the last phrase about goodwill was not part of the arrangement discussed between the parties. In any event Mr Jary was not party to these exchanges, the condition was waived, the sale agreement became unconditional and settlement was completed by 28 May 2008.

[8] With the consent of the parties and except as disclosed in this determination I make an order prohibiting the publication of any of the terms of the sale agreement dated 16 May 2008 between Woodhams and PGG Wrightson Limited.

PGG offers Mr Jary employment

[9] What preceded Mr Jary's suspension on 22 May were some exchanges between him and PGG about employment. In the week of 5 May Mr Jary was given a proposed employment agreement by PGG. That includes a non-competition restraint provision applicable for three months after termination and a non-solicitation restraint provision applicable for six months after termination.

[10] There were further exchanges between Mr Jary and PGG on 12 May and 14 May. On 14 May PGG offered to employ Mr Jary without either restraint provision. Despite that Mr Jary declined employment with PGG. It appears that PGG knew that Mr Jary would not work for them but proceeded with the purchase anyway.

Mr Jary and Mainland Wool

[11] William Thomas is a farmer, a director of PGG, a client of Woodhams and has sold wool to PGG. About 7 June 2008 he received a circular headed *Mainland Wool Ltd*. that announced a new wool company from 1 July 2008 with Mr Jary joining as a partner in business with Chris Bell and Dean Harrison. The last two men are directors of a wool broking business called Harrison Wool Services Canterbury Limited. There is a subsidiary company that provides a wool auction service for clients who prefer that method of selling. It appears from the circular and company office records that Harrison Wool Services Canterbury Limited will change its name to Mainland Wool Limited. Mr Jary's vehicle has apparently been seen at Harrison Wool Services Canterbury Limited's premises on an almost daily basis since 5 June 2008.

[12] The full details of Mr Jary's involvement in this new business need to be fleshed out but it seems he has a financial interest, that the business did compete with Woodhams and will compete with PGG.

[13] Mr Jary makes a point about PGG intending to concentrate on providing clients with an auction system rather than the business method of buying wool used by Woodhams. The point makes no difference. These methods are looking to source the same wool from the same farmers who have a choice. It is also a reasonable inference that Mainland Wool Limited will continue Harrison Wool Services Canterbury Limited's auction service.

Assignment of the restraints

[14] It is convenient to start with the issue of PGG's right to enforce a restraint in reliance on the employment agreement between Mr Jary and Woodhams.

[15] PGG says that the restraint provisions were validly assigned to it under the sale and purchase agreement. The agreement includes definitions of *assigned rights*, *assets* and *goodwill* all of which were transferred to PGG. *Assigned rights* includes contractual rights; *assets* include choses in action; and *goodwill* means the goodwill and trading reputation of the business including the benefit of Woodhams' right and interest in the assigned rights. On the assumption that the restraint of trade in Mr Jary's employment agreement was capable of assignment, there is a strongly arguable case that such an assignment was effected by the sale agreement.

[16] *The Laws of New Zealand* states that generally the benefit of a contract can be assigned but not if the contract is in some way personal to the original parties. The right to employ a person under a contract of service has never in modern times been regarded as capable of assignment: see *Nokes v Doncaster Amalgamated Collieries Limited* [1940] A.C. 1014. Applying the same principle, the Employment Court observed in *Gibbs v Crest Commercial Cleaning Ltd* [2005] ERNZ 399 that it is a long standing principle of employment law that no person (whether employee or employer) may be compelled to engage in an employment relationship with another.

[17] In the present case the argument is that the restraint and non-solicitation clauses are to protect the goodwill of the business and are capable of assignment independently of the employment relationship. I am referred to *Williams v Masters* (1912) 31 NZLR 1148. There a company engaged Masters as a commercial traveller and the written agreement included restraint provisions. Later, the plaintiff (Williams) entered into an agreement with the company taking over the company's contracts including with its employees and the company also assigned the benefit of its employment agreements to the plaintiff. Subsequently Masters established his own business in partnership with another former employee and the plaintiff sought to enforce the restraints. The Court accepted that there was a breach of the restraints if the plaintiff was in a position to enforce them. Ultimately the Court found that the restraints were too wide to be enforceable and dismissed the claim. However, in getting to that point the Court said:

> *A personal covenant such as that between the company and employees is not enforceable by an assignee unless it is assigned as part of the goodwill of a*

> *business. When it is sold as part of such goodwill, …, it may be that it is enforceable by the purchaser of the business. The plaintiff here relies on authorities which in certain circumstances at least support this proposition. …The last of these cases supports the proposition that such a covenant in an agreement for personal services entered into for the preservation of the goodwill of a business is not regarded as a purely personal covenant, and may be enforced by an assignee of the goodwill. Unless it is shown to be sold with the goodwill of a business, however, it is still regarded merely as a personal agreement:* Davies v Davies *36 Ch.D 359.*

[18] The case referred to by the Supreme Court as supporting in certain circumstances the proposition advanced by the plaintiff was *Welstead v Hadley* 21 T.L.R. 165. That case involved business proprietors who sold their business. As part of that transaction they became managing directors of the purchaser company and agreed to covenants in restraint of trade. An assignee of the purchaser's business later successfully enforced the covenants. On appeal the Court held that the covenants were not personal but were inserted for the protection of the business and so were enforceable by an assignee.

[19] There are several High Court cases referred to in argument that should be mentioned. *Castle Parcels Ltd v Dale & Ors* (1989) 2 NZELC 78-265 was an application by an assignee for an interim injunction against the assignor's former courier drivers whose contracts (for services) included widely drawn restraints. There the Court was inclined to the view that the contracts involved personal skill and confidence on the part of both parties and were not themselves assignable under general principles; but that did not necessarily mean that the covenant in restraint of trade could not form part of the goodwill of the business capable of assignment. In *Gardner & Ors v Cooper & Ors* HC Auckland CP 1360/90 the Court cited this passage from *Castle Parcels Ltd* with approval in making an interim injunction against two former employees of a company that had sold its business and at least implicitly assigned its employment agreements to the purchaser.

[20] *Williams v Masters* does not support the proposition that a restraint in an employee's employment contract may be assigned as part of the employer's goodwill. The Court there referred to the plaintiff's submission as being supported in *certain circumstances*. As noted, *Welstead* involved managing directors so while theirs was

personal service it was not as employees. *Castle Parcels Ltd* involved contractors not employees. However, *Gardner* did involve employees and on the strength of that case I find that it is arguable that a restraint affecting an employee may be part of the goodwill of a business and capable of assignment independently of the employment relationship.

[21] Having said that, I note that there are significant arguments to the contrary. Given the emphatic tone of *Nokes* there are no circumstances short of explicit statutory language by which the employment itself can be assigned. If *Gardner* is right, then from the employee's perspective at common law a burden of a contract that survives its termination can be validly assigned but none of the benefits are assignable. This case touches on a significant point potentially affecting many employees and employers and consideration will be given to removing the substantive problem to the Employment Court.

Reasonableness of the restraints

[22] The issue here is whether the restraints are arguably reasonable so as to be enforceable.

[23] The restraint of trade provision (clause 43.1) is too uncertain of meaning to be enforceable. It purports to restrain an ex-employee from having any interest in any business in relation in any way to the employer. What does *in relation in any way to the Employer* mean? If it does have a meaning it might be a reference to any connection to the employer. Does that prevent an ex-employee's involvement in a business that has premises in the same town as the employer, that being a connection? That demonstrates how wide the restraint might be if an attempt is made to give it some meaning. However, the better view is that the clause really has no meaning at all because of its poor drafting. I find that clause 43.1 is not reasonable or capable of modification by the Authority to make it so, even to an arguable standard.

[24] Perhaps with a measure of foresight the contracting parties included a provision setting out what should happen in the event of invalidity as just found. The invalid provision is deemed to have been deleted from the employment agreement but the agreement otherwise affirmed. The effect is that there is no valid restraint.

[25] The non-solicitation clause is too wide to be enforceable in its current state. It purports to prevent an ex-employee from soliciting or endeavouring to entice away

from the employer even a prospective client/customer. On its face that prevents an ex-employee from soliciting anyone who might sell wool.

[26] PGG submitted that there is power to invoke section 8 of the Illegal Contracts Act 1970 which permits the Authority to modify an unreasonable restraint. Section 164 of the Employment Relations Act 2000 stipulates several pre-conditions to the exercise of the power to modify a contract none of which have been satisfied at present. Despite those stipulations it remains correct that the non-solicitation clause is capable of modification in order to make it reasonable and therefore enforceable. On that basis I accept that the clause should be treated as arguably reasonable for present purposes.

[27] To summarise, I find that PGG has a case to an arguable standard that the non-solicitation could be enforceable but does not have a case that the restraint of trade provision is arguably enforceable.

Evidence of breach

[28] There is a finding above about Mr Jary having an interest in a business in competition with the business now owned by PGG. However, because of the finding that clause 43 is not capable of enforcement, there is no evidence to establish to even an arguable standard that there is a breach of contract associated with Mr Jary's financial interest.

[29] There is the finding that clause 42 is arguably reasonable and enforceable. The evidence suggesting a breach of this provision at least as regards Woodhams' clients is the circular received by Mr Thomas. It is arguable that this amounts to solicitation.

Balance of convenience

[30] The finding that there is arguably a breach of clause 42 but not a breach of clause 43 makes a difference to an assessment of the balance of convenience. Mr Jary is not prevented from working in his field of expertise by an order preventing him from soliciting Woodhams' clients for his new business.

[31] I accept PGG's submission that there are potential difficulties assessing damages if a breach is eventually established. The financial harm could also be very

significant. It was not suggested that PGG would not be able to meet its undertaking if no breach is eventually established.

[32] This supports a limited form of interim injunction.

[33] There is nothing else about the situation as currently before the Authority to suggest a different outcome would be just.

Interim Injunction

[34] Pending further order of the Authority, Mr Jary is prohibited from soliciting for his new business any of Woodhams' existing clients as at May 2008.

[35] There was no focus during the investigation meeting of the proper form of an interim injunction limited to the partial enforcement of clause 42. Accordingly leave is reserved for either party to seek directions as may be necessary.

[36] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority