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Turners and Growers Limited v Marshall AC24/09 [2009] NZEmpC 50 (17 June 2009)

Last Updated: 8 July 2009

IN THE EMPLOYMENT COURT

AUCKLANDAC 24/09ARC 38/09

IN THE MATTER OF an application for search orders

BETWEEN TURNERS AND GROWERS LIMITED
Plaintiff

AND ARTHUR MARSHALL
Defendant

Hearing: 17 June 2009 (without notice in Chambers)

(Heard at Auckland)

Appearances: Penny Swarbrick and Richard Upton, Counsel for Plaintiff

Judgment: 17 June 2009

REASONS FOR INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] These are the reasons for refusing to grant a search order against the defendant without notice to him. Turners and Growers Limited is now the former employer of Arthur Marshall. The company applied late on the afternoon of 16 June for a search order, what used to be known as an Anton Piller order.

[2] The essence of the search order sought by the plaintiff would require named persons, the executors of the order, to enter Mr Marshall's home or other premises or vehicles to search for, inspect, photograph or copy, and to deliver into the safekeeping of the plaintiff's solicitor, documents and articles listed in the application, or such other items as the plaintiff's solicitor may believe to be a listed item. One of the proposed executors of the order is a computer forensic analyst who, if the order were granted, would be allowed to make forensic images of electronic documents and to search those images for relevant electronic information. The documents sought to be seized are broadly described as all material (in any form including written or electronic form) relevant or in any way related to either the plaintiff or these proceedings. Such material may be in media including printed documents, handwritten documents, electronic documents, computers, floppy disks, USB memory sticks and USB storage devices, DVDs and CD-Roms, mobile phones and personal digital assistants, MP3 memory players with data storage facilities and any other device capable of data storage.

[3] After hearing counsel in support of the application, I decided that one of the essential statutory ingredients for granting such an order was not established on the evidence. Because, however, the plaintiff should have opportunities to both appeal against that refusal and to apply without notice for other injunctive orders, I prohibit publication of this judgment beyond the plaintiff and its solicitors and counsel for the period of 7 days from today's date or such further period as I might direct if the plaintiff undertakes either or both of those courses but is unable to obtain a decision or to execute any orders obtained within that time. This prohibition will allow the plaintiff the forensic benefits of a without notice (ex parte) application for other orders but is not intended as an indication of

any view by this Court as to whether such orders should be made or even made without notice.

[4] Turners and Growers Limited (“Turners”) is a clearing house for fruit and vegetables. Its commercial relationships are with farmers and producers of a wide variety of fruit and vegetables. It sells these products to retailers by one of two methods. The first is by taking a commission on sales made on behalf of producers. The second is as a buyer of fruit and vegetables from those producers and a reseller of them to purchasers at a profit. Turners has these different entrepreneurial arrangements with different producers.

[5] Between 9 June 1998 and 5 June 2009, Mr Marshall was employed by Turners as a salesperson. His employment ended on 5 June as a result of the expiry of notice that he gave to the company about 7 weeks ago.

[6] Mr Marshall’s employment agreement with Turners made certain express provisions affecting competition between the parties, both during and following employment. These express terms included a prohibition upon Mr Marshall using Turners’ confidential information without its consent, a requirement that he return company property upon termination of his employment and a covenant in restraint of competitive commercial activity. This covenant purported to prohibit him from being involved in any economic activity that competed with Turners for the period of 3 months following the end of his employment.

[7] There is evidence that whilst still employed by Turners, Mr Marshall had copied substantial amounts of its confidential information relating to purchase arrangements with particular customers including prices paid for products and resale prices. There is evidence that Mr Marshall supplied such confidential information to Paul Dellabarca, who is an independent produce broker. There is evidence that Mr Dellabarca has, by revealing his possession of this allegedly confidential information and by threats to both publicise allegedly unlawful and/or unethical practices by Turners and/or to precipitate formal investigations of the company’s practices under the [Commerce Act 1986](#), sought to have Mr Marshall reinstated in employment with Turners and, by implication, on more remunerative commission arrangements than previously.

[8] Turners has demanded the return of its property, being all copies of such confidential information, but Mr Marshall has either ignored these requests or asserted his entitlement to act without constraint now that he is no longer an employee of the company. There is also evidence that he has sought to solicit business of Turners’ producers and to set up in competitive commercial activity using the allegedly confidential information taken by him from his former employer.

[9] I accept that evidence supporting the foregoing allegations might well entitle the plaintiff to interlocutory injunctive relief against Mr Marshall and perhaps, albeit in another jurisdiction, also against Mr Dellabarca. If the allegations are sustained at trial, they may entitle Turners to both permanent injunctive relief and damages.

[10] However, it is the particular nature of the injunctive relief that Turners has claimed in this Court (a search order) that is problematic.

[11] The Employment Court is now empowered to issue such an order in appropriate cases: *Te Runanga O Ngati Whatua v Brence* AC18/09, 21 April 2009. Several of the prerequisites for the grant of a search order under Part 33 of the High Court Rules 1985 are established. The company has a strong prima facie case on accrued causes of action and the actual or potential losses to it will be serious. There is evidence that Mr Marshall is, or at least has been, in possession of the property of the plaintiff, being its confidential information.

[12] However, I am not satisfied that the company cannot ascertain the nature of all the information and other property that it says Mr Marshall has taken from it unlawfully. More pertinently, there is no sufficient evidence that Mr Marshall may destroy such material or cause it to be unavailable for use in evidence in the proceedings. Although, to at least a prima facie level, Mr Marshall has been shown to have acted boldly, even recklessly, and defiantly in relation to his former employer and its confidential information, there is no evidence even of a propensity on his part for the destruction or concealment of, or other such conduct in relation to, the material taken by him. That is a fundamental prerequisite to, and the rationale for, the making of a search order.

[13] The evidence establishes to a strong prima facie level that in the early hours of 30 April 2009 Mr Marshall printed in hard copy significant amounts of Turners’ confidential information about its purchases from, and sales to, customers. Indeed, copies of some of that information have been given to its Board chairman, Anthony Gibbs, by Mr Dellabarca. The plaintiff says that, except for the material given to Mr Gibbs as just noted, a “screen dump” from its computer system running SAP software does not reveal the full nature of the confidential information copied by Mr Marshall. It is significant, however, that although the plaintiff proposes the involvement of a computer forensic analyst in the execution of search orders sought, there is no evidence from that analyst or any other expert as to why examination and analysis of the plaintiff’s computer system cannot reveal the nature of the material copied by Mr Marshall. It would be surprising if analysis going beyond a simple “screen dump” of the printer information would not reveal detail of the information copied by the defendant.

[14] Ms Swarbrick submitted that the evidence of serious risk of destruction or disposal of the material is contained at paragraphs 60 to 69 of the affidavit of Delys Tansley, the plaintiff’s general manager of human resources. Ms Tansley deposes that Mr Marshall has denied having confidential information but describes him, from her experience of dealings with him, as “cagey, inconsistent, antagonistic and does not give accurate responses to questions asked.” Ms Tansley reports comments by Mr Marshall to her that “*he could do what ever (sic) he liked now that he had left.*” Among other allegations and evidence, that is the only evidence to which the plaintiff points in support of its contention that there is a serious risk of destruction or disposal of material. In my conclusion, however, this does not meet even a basic prima facie standard.

[15] Nor am I prepared to infer that other evidence of nefariousness alluded to in the plaintiff's affidavits means that Mr Marshall will probably destroy, or at least conceal from forensic discovery, the material he has or has had that is the property of Turners. There is no sufficient tangibility to the statutory requirement of likely destruction or concealment.

[16] I am conscious that it is often difficult for a plaintiff in these circumstances to adduce such evidence and that a judge must be entitled to use common sense and experience of similar conduct: *Busby v Thorn EMI Programmes Limited* [1984] 1 NZLR 461 (CA). But the authorities are equally clear that if an intention to destroy or conceal cannot be established, there is no basis on which the Court can act: *Columbia Picture Industries Inc v Robinson* [1986] 3 WLR 546; *Fieldforce (NZ) Ltd v Auchterlonie* [1994] NZHC 1407; (1994) 7 PRNZ 563. The case is distinguishable in this regard from *Te Runanga O Ngati Whatua* (above) in the sense that the plaintiff in that case had established a propensity on the part of the defendant to destroy or conceal unlawfully obtained information by the use of computer program wiping software.

[17] The plaintiff has failed to establish one of the essential requirements for the grant of a search order, namely under r33.3(c)(ii) that "*there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court*".

[18] The plaintiff's real objectives are to prevent further or anticipated breaches by Mr Marshall of his legal obligations. In particular, it wishes to stop him or others misusing its confidential information, the nature of which it is aware or at least of which it has not been shown to be unaware. Turners seeks to enforce the covenant in restraint of competitive commercial activity. It also wishes to have returned to it all copies of confidential information held by Mr Marshall and also by Mr Dellabarca although, in respect of the latter, an application may be required to be made in another court. None of those logical objectives, to which the plaintiff may well be entitled in law, requires a seizure and analysis of material held by Mr Marshall and which is at risk of destruction or concealment unless it is able to be seized without notice to Mr Marshall.

[19] I am not satisfied that the plaintiff requires a search order as a last resort. As the authorities note, because such an order is so invasive, a proportionality approach to its making is so required. If the case can be dealt with by a less drastic procedure, as I am satisfied this can, that should be followed. Inspection and preservation orders, discovery and interrogatories, albeit modified appropriately to reflect the different approach of the Employment Relations Authority and limitations on its powers, can meet the plaintiff's legitimate objectives of cessation of unlawful activity by the defendant.

[20] This is not an appropriate case for the making of an intrusive and draconian search order as has been sought by the plaintiff and its application was dismissed for these reasons.

GL Colgan

Chief Judge

Judgment signed at 1.30 pm on Wednesday 17 June 2009