

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011]NZERA Christchurch 128
5312456

BETWEEN	WARREN SKERRETT INVESTMENTS LIMITED Applicant
AND	CAMELOT NEW ZEALAND LIMITED PARTNERSHIP Proposed second applicant
A N D	DONALD BROAD Respondent

Member of Authority: Helen Doyle

Representatives: Rob Towner, Counsel for Applicant and Proposed Second Applicant
Peter Churchman, Counsel for Respondent
Lesley Brook Counsel for Southern Wealth Management Limited (opposing production of documents)

Application by applicant for joinder of Camelot NZ Limited and production of documents by Southern Wealth Management Limited and affidavit in support of Kok Yaw Chong sworn 25 May 2011: 31 May 2011

Submissions for Southern Wealth Management Limited and affidavit of Ross Martin Valentine sworn 30 June 2011: 4 July 2011

Notice of opposition by respondent to joinder of Camelot NZ Limited: 27 July 2011

Applicants submissions in support of applications for joinder and production: 3 August 2011

Respondents submissions in opposition of application by Camelot New Zealand Limited Partnership to be joined as second applicant: 9 August 2011

Applicants submissions in reply to application by Camelot NZ Limited Partnership: 16 August 2011

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Date of Determination: 23 August 2011

**DETERMINATION OF APPLICATION BY CAMELOT NZ PARTNERSHIP
FOR JOINDER TO THE APPLICATION AND APPLICATION FOR NON
PARTY DISCLOSURE OF DOCUMENTS UNDER S 160(1)(a) OF THE
EMPLOYMENT RELATIONS ACT 2000**

Application for joinder by Camelot NZ Limited Partnership as second applicant

[1] Camelot NZ Limited Partnership (CNZL) seeks an order that it be joined as second applicant to the proceeding. It relies in its application on s.221 of the Employment Relations Act 2000 that enables the Authority to, if considers it would more effectually dispose of the case, direct that parties be joined.

[2] The employment relationship problem lodged with the Authority by Warren Skerrett Investments Limited (WSIL), a specialist investment advisor, alleges breaches by the Donald Broad of express provisions of the employment agreement it had with him. There is a claim for damages. Mr Broad gave one month's written notice of his resignation to WSIL on 29 June 2009 and he was placed on garden leave until the expiry of his notice period and his employment ended on 29 July 2009.

[3] In or about August 2009 Mr Broad went to work for another finance company Broadbase Central Limited (Broadbase) that traded under that name until May 2010 when the brand and company name changed to Southern Wealth Management Limited (SWM).

[4] It is alleged that Mr Broad breached clauses 11.7.1 and 11.7.2 of the employment agreement relating to non-solicitation of clients and the use of confidential information when up to 21 clients transferred their business to Broadbase including 12 clients five weeks before the resignation. Mr Broad denies any breaches of his employment agreement.

[5] The period of the restrictive covenant in clause 11.7.1 is two years following termination of employment.

[6] The reason for the application for joinder is provided in the affidavit of Kok Yaw Chong known also as Eric. He is authorised to swear the affidavit on behalf of CNZL and WSIL. There was a sale by WSIL to CNZL of its business pursuant to a sale and purchase agreement dated 30 September 2009. Mr Chong deposes in paragraph 7 of his affidavit that on and from 30 September 2009 all of WSIL's title and other rights in its business and assets passed to CNZL free from encumbrances. He states in his affidavit that the title and other rights in WSIL's business and assets passing to CNZL included WSIL's rights to business agreements relating to the operation of WSIL's business and that this would have included employment agreements.

[7] Mr Chong also deposes in paragraph 11 that after 30 September 2009 but before the end of December 2009 five further clients requested to transfer their accounts to Broadbase Central Limited (Broadbase).

[8] Mr Towner submits in his memorandum in support of the application that the presence of CNZL is necessary to enable the Authority to effectually investigate and resolve all questions involved in this employment relationship problem without the need for separate applications.

[9] The respondent opposes the application for CNZL to be joined as a second applicant on the basis:

- The respondent and CNZL were not parties to an employment relationship and the Authority has no jurisdiction in respect of CNZL's claim.
- The benefit of a restraint of trade is not assignable.
- There is no valid cause of action against the respondent disclosed in the application against the respondent – not expressly set out in the application that respondent solicited the five clients in breach of the obligations of non solicitation and suffered loss.
- The agreement for sale and purchase dated 30 September 2009 is not annexed to the affidavit in support of the application for joinder as it properly should have been.

Determination on joinder application

[10] The full Employment Court in *PGG Wrightson v Jary* [2008] ERNZ 476 concluded in para. 25 the Authority had jurisdiction to determine whether PGG Wrightson could enforce the benefit of a restrictive covenant that arose out of a previous employment relationship.

[11] I accept that the Authority likewise has jurisdiction in this matter to determine whether CNZL can enforce the benefit of the restrictive covenant in the employment agreement between Mr Broad and WSIL. The legal issue is whether the benefit of the restrictive covenant is assignable.

[12] The Authority was provided with copies of all the relevant cases that were referred to in *PGG Wrightsons* and extracts from overseas texts relevant to the legal question whether a restrictive covenant is assignable. The Employment Court did not express a general statement of principle in *PGG Wrightson* about whether restrictive personal covenants can be assigned. The Authority determination in *Precision Tracking (NZ) Ltd v Tait* CA 216/09 was issued following *PGG Wrightson* and concerned an application for an interim injunction. Although after analysing the relevant cases the Authority concluded that there were significant legal obstacles for the applicant in that case to overcome regarding the assignment of the restrictive covenants the matter was never the subject of a substantive determination. The High Court judgment in *Post Haste Couriers Ltd v Casey* (unrep) High Court, Invercargill 24 October 1989 dealt with a similar question and was referred to both in the *PGG Wrightson* case and by the Authority in *Precision Tracking*.

[13] I accept Mr Churchman's submission that provisions of the sale and purchase agreement and the individual employment agreement will be important in this matter. The Authority will need to investigate the matter by hearing evidence, considering relevant documents including the contents of the sale and purchase agreement which, although not provided in full, I do not consider at this stage fatal to the joinder application and considering legal submissions –*Carter Holt Harvey Ltd v Hastie* (unrep) AC10B/03 Colgan J. I am not satisfied on the basis of the case law provided and analysed the Authority should or indeed can simply reject the application by CNZL to be joined to the proceeding at this stage without an investigation. The case

law and submissions in respect of it will of course be relevant in due course but to reach any conclusions at this point would be premature.

[14] There is in this case a real possibility of separate proceedings if CNZL is not joined to this proceeding and that would be expensive for the parties and involve delay. Joining the company will enable the Authority to more effectually dispose of the employment problem.

[15] Having considered all the submissions and viewed the relevant case law I order Camelot NZ Limited Partnership be joined as a second applicant to the proceedings.

Application for non party disclosure of documents under s 160(1)(a) of the Employment Relations Act 2000.

[16] There is no formal process for discovery of documents in the Authority but s. 160(1)(a) of the Employment Relations Act 2000 provides that the Authority may, in investigating any matter, call for evidence and information from the parties or from any other person.

[17] In this case WSIL seeks documents from SWM. Ms Brook represents SWM and provided submissions in opposition to the application for the production of documents and an affidavit of Ross Martin Valentine investment advisor and sole director of SWM. Mr Valentine attached to his affidavit documents from files held recording how and why the listed clients of WSIL became Broadbase clients as he accepted that was relevant to the dispute between WSIL and Mr Broad. He objects to disclosing all other information.

[18] Both Mr Towner and Ms Brook considered the Authority would be guided by the standard approach of the civil courts to non party disclosure in exercising its discretion under s 160(1) of the Act to call or not for information from SWM. I accept that is a useful way to approach the exercise. Ms Brook and Mr Towner were largely in agreement that the following criteria reflected the standard approach of the High Court in non party discovery applications:

- Ground must exist for belief that documents exist, have been in the control or possession of the non-party
- The document or class of document would have been discoverable if the non-party was a party; and
- The order is necessary at the time it is sought.

[19] Ms Brook submitted that the Authority should be more cautious in approaching the application for production of documents than the approach taken in another Authority determination Mr Towner referred to *Jackel (NZ) Limited v Ireland* (AA75/04, 4 March 2004). She submitted that this was because in that case the respondent was a director of the company from which production was sought. SWM is an independent third party. Mr Towner submits that SWM is not an entirely independent party because it is Mr Broad's employer. I agree that the focus should be on the Authorities role in resolving employment relationship problems in requesting documents from an organisation that is not a party to the proceedings and whether those documents are relevant assessed in that regard.

[20] The documents requested by WSIL in schedule A are:

- (1) Written correspondence including (but not limited to) proposals for work to be performed, reports of investment activity and any other letters, emails or facsimiles between SPM and 22 clients one expressed as an *or* (a-v) between 1 May 2009 and 27 May 2011. The clients are named but I am not going to repeat the clients names.
- (2) Copies of advertising material, including (but not limited to) pamphlets, invitations to seminars, market research, clients newsletters or updated, sent by SWM to any of the clients listed in paragraph 1(a) to (v) above during the period 1 May 2009 and 27 May 2011.
- (3) Written records of discussions, including (but not limited to) file notes, telephone notes, meeting notes, or transcripts, between SPM and any of the clients listed in paragraph 1(a) to (v) above, during the period between 1 May 2009 and 27 May 2011.
- (4) Copies of invoices, receipts and/or account statements for any work completed by SWM for any of the clients listed in paragraph 1(a) to (v) above, during the period between 1 May 2009 and 27 May 2011.

- (5) Telephone records relating to any phone operated by the respondent in his capacity as an SWM employee (which is likely to include records relating to the respondent's direct office line and company mobile phone), for the period between 1 May 2009 and 27 May 2011.
- (6) Reference to letter, emails, file notes, reports, records and other documents in paragraphs 1 to 5 above includes those things whether held by SWM in electronic or in hard copy form.

[21] Ms Brook submits that the documents requested are not relevant or necessary to determine whether the restraint is enforceable and until that is determined the issue of whether the restraint has been breached and quantum will not need to be considered. She submits that the documents requested in relation to the clients and telephone records are confidential and would be released to a competitor and that would be highly prejudicial. Further she submits for a variety of reasons that the application appears to be a fishing expedition. She refers to some of the clients falling outside of the geographical area of the covenant. Ms Brook said that the information in any event could be obtained from the clients themselves.

[22] I accept Mr Towner's submission that the Authority is required to consider the proceedings lodged with the Authority - the amended statement of problem and amended statement in reply to ascertain what documents are relevant for investigation and determination of the issues between the parties. The key issues from considering the documents are the following:

- The enforceability of the restrictive covenant in clause 11.7 of the employment agreement including an interpretation of the meaning of that clause.
- Was there a breach of the clause and, if so;
- Is there loss?

[23] Mr Valentine has annexed copies of documents relating to solicitation but the nature of the problem required to be investigated is wider than the initial transfer of the clients/customers because clause 11.7.1 includes the words *seek to solicit or carry out any work of the same nature for any client or customer of the Employer with*

which the Employee had any contact or dealings whilst employed by the Employer within the Southland and Otago region.

[24] The period of restraint is two years although I accept that the amended statement of problem also refers to alleged breaches before termination based on the timing of the transfer of some clients to Broadbase and therefore relevancy is not limited to the period from termination. In the circumstances I am not satisfied that requesting documents in terms of the named clients for a period from May 2009 to May 2011 is excessive and further the application by CNZL to be joined has been granted.

[25] I find that there is a reasonable belief on the part of WSIL that SWM possess some but not all the documents requested in schedule A in client files. Mr Valentine in his affidavit set out his response to *the usual process* set out in Mr Chong's affidavit when clients transfer their business. He explained why the *usual process* did not apply in this case. I am not satisfied that the application is a fishing expedition. It is known that shortly before and after Mr Broad indicated he intended to resign a number of clients of WSIL transferred to SWM and I find that WSIL has established sufficiently that there is or is likely to be documentation pertaining to each of the named clients. There are several statements in Mr Valentine's affidavit going to the strength of the case against Mr Broad. All I am considering in this application is whether the Authority can request documents that will be relevant to determining the issues before it as it may do in any employment relationship problem. I am not at this point in time considering the merits of the claim.

[26] I am not persuaded that, although possible, it would be more appropriate for information to be requested from the clients directly. It would require a good deal of work to write separately to each client and then place the burden on that client to provide the information. I accept that Mr Valentine has concerns over the confidentiality but that of itself is not a ground to resist disclosure and some safeguards can be put in place to protect the confidentiality if necessary. I agree with Mr Towner's submission that there is no suggestion from the affidavit of Mr Chong that the documents if provided would be used for improper purposes.

[27] I do accept that there is a possibility at least that if liability is established and the Authority is required to consider the issue of loss and damages it may have two separate meetings. Ideally though all matters would be investigated at the same meeting and evidence about all elements of the claim provided and in that way costs will be reduced. I find that the information relating to any loss should on that basis be provided now.

[28] I have considered clients (x 3) who transferred to SWM and are clients outside the Southland and Otago region. The Authority will need to consider the meaning of clause 11.7.1 and what that region applies to. I conclude that information relating to these clients is relevant until that is done Mr Valentine deposes to MMM Trust not being a client so I accept has no information to provide in relation to that client.

[29] The telephone records have been requested on the basis they are necessary to determine whether the respondent carried out work for the ex-clients during the restraint period. That information though at this stage I consider is capable of being ascertained from the invoices and from the file contents and the other documents. I make no order for disclosure of telephone records at this stage.

[30] Mr Valentine in his affidavit deposed that the only marketing he did was at Christmas time. I conclude however that any promotional type material or activities within the period they are requested are relevant and the request is appropriately restricted to the named clients.

[31] WSIL recognises appropriately that it may be necessary for it to make a reasonable contribution to costs incurred by SWM if the Authority was to make any order for non party disclosure.

[32] I direct SWM to produce through filing in the Authority and providing copies to counsel the following documents that are in SWM's possession by 30 September 2011:

- (a) **Written correspondence including (but not limited to) proposals for work to be performed, reports of investment activity and any other letters, emails or facsimiles between SPM and 22 clients one expressed as an *or***

(a-v) between 1 May 2009 and 27 May 2011 with the exception of MMM Trust.

- (b) Copies of advertising material, including (but not limited to) pamphlets, invitations to seminars, market research, clients newsletters or updated, sent by SWM to any of the clients listed in paragraph 1(a) to (v) above during the period 1 May 2009 and 27 May 2011.**
- (c) Written records of discussions, including (but not limited to) file notes, telephone notes, meeting notes, or transcripts, between SPM and any of the clients listed in paragraph 1(a) to (v) above, during the period between 1 May 2009 and 27 May 2011.**
- (d) Copies of invoices, receipts and/or account statements for any work completed by SWM for any of the clients listed in paragraph 1(a) to (v) above, during the period between 1 May 2009 and 27 May 2011.**
- (e) Reference to letters, emails, file notes, reports, records and other documents in paragraphs above including those things whether held by SWM in electronic or in hard copy form.**

[33] As is usual all documents directed to be produced are to be used only for the purposes of this investigation. I also direct that the documents in (d) are for counsel for the applicant only and no copies are to be made except to an accountant or financial adviser whose purpose is to assist in assessing any issue of loss or damage for the Authority investigation. Either party may return to the Authority if further confidentiality safeguards are thought to be required or other issues arise.

Costs

[34] I reserve the issue of costs on the application to join CNZL until after there is a determination on the substantive matter. I would hope that counsel can agree to costs on the application for production of documents. If not, I reserve leave to Ms

Brook to come back to the Authority and request Southern Wealth Management Limited be joined to the proceeding for the purposes of costs.

Helen Doyle

Member of the Employment Relations Authority