IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 40
5312456

	BETWEEN	WARREN SKERRETT INVESTMENTS LIMITED First Applicant
	A N D	CAMELOT NEW ZEALAND LIMITED PARTNERSHIP Second Applicant
	A N D	DONALD BROAD Respondent

Member of Authority:	Helen Doyle
Representatives:	Rob Towner and Elizabeth Coates, Counsel for First and Second Applicants Peter Churchman, Counsel for Respondent
Investigation Meeting:	On the papers
Date of Determination:	26 February 2013

PRELIMINARY DETERMINATION OF THE AUTHORITY (No 5)

A. The application to determine whether a restraint of trade covenant is assignable to, and enforceable by the second applicant as a separate preliminary matter is dismissed.

Employment relationship problem

[1] The respondent has made an application to the Authority that the specific matter of whether a restraint of trade covenant is assignable to, and enforceable by, the second applicant be determined as a separate preliminary matter by the Authority before the substantive investigation. The application is made on the grounds that such an approach would not put the parties to the expense of preparing for and undertaking

a full hearing if the respondent's position that the covenant cannot be assigned to, and enforced, by the second applicant is upheld.

[2] The second applicant purchased the first applicant's business after the respondent had resigned. The first and second applicants oppose the application. They do not accept that this approach would achieve the desired result of saving costs.

[3] The background to the proceeding in the Authority is that the first applicant employed the respondent in 2008. The first applicant was in the business of financial planning and advising. There is a signed written employment agreement between the first applicant and the respondent that describes the respondent as an adviser. There are provisions in the employment agreement relied on in the proceedings about employee obligations, confidential information and a two year restrictive covenant with respect to non-solicitation of clients.

[4] The respondent resigned from his employment giving one month's notice on 29 June 2009. The first applicant says that the respondent breached clauses 4.2 of the employment agreement whilst employed and clauses 11.7.1, 11.7.2 and 11.7.3 since leaving the first applicant's employment. The first applicant seeks in relation to alleged breaches of clause 4.2 an inquiry into loss and orders for damages and, further, an order for damages under clause 11.7.3. The first applicant also seeks an order, if any aspect of clause 11.7 is illegal, under s.8 of the Illegal Contracts Act 1970 modifying that clause to the extent required to remedy any issue of illegality.

[5] The respondent denies breaching his employment agreement with the applicant. He says that he has not sought to solicit work from clients of the applicant or to carry out work for those clients. Further, the respondent says the non-solicitation clause is prima facie unenforceable and unreasonable and there should be no order modifying the restraint of trade provisions in his employment agreement. The respondent says to the extent that he carried out work for former clients of the applicant, such work is not in breach of the respondent's employment agreement.

[6] After the respondent resigned from his employment with the first applicant, the first applicant sold its business to the second applicant pursuant to a sale and purchase agreement dated 30 September 2009 with the sale effective from that same date. The second applicant is a financial advisory limited partnership and was joined to the proceedings in Authority determination [2011] NZERA Christchurch 128.

[7] Kok Yaw Chong (Eric) , was authorised to swear an affidavit on behalf of the first and second applicants, which was lodged in support of the application for joinder. He deposed in clause 10 of his affidavit that 16 clients of the first applicant requested to transfer their accounts to the respondent's employer between 22 June 2009 and 30 September 2009. He further deposed in clause 11 of his affidavit to 5 clients requesting to transfer their accounts after the first applicant sold its business to the second applicant from 30 September 2009 but before the end of December 2009.

The issues

[8] The Authority has to determine the following issues:

(a) The jurisdiction to separate issues and determine them as preliminary matters;

(b) If the Authority is satisfied that it has jurisdiction then should the Authority separate the issue as to whether the restraint of trade clause can be assigned by the first applicant and enforced by the second applicant and determine it as a preliminary point;

(c) In considering the second issue, the Authority needs to consider:

(i) Would it be more cost effective to deal with the matter in this way;

(ii) How the Authority would hear the preliminary issue; on the papers or by way of investigation meeting and if the latter the length of any such hearing;

(iii) Whether it would add to delay in resolving the proceedings;

(iv) Would a decision result in the end of the litigation?

(v) The length of the substantive investigation meeting and whether it would be significantly lessened by determining the preliminary issues?

(vi) Any other advantages and disadvantages with such an approach.

Jurisdiction

[9] The Authority can under s.221(d) of the Employment Relations Act (the Act) at any stage of the proceedings, of its own motion, or on the application of any of the parties, generally give such directions as are necessary or expedient in the circumstances to more effectually dispose of any matter before it. The Authority may under s 160(1) (f) of the Act in investigating any matter follow whatever procedure it considers appropriate but must under s 173 (1)(a) and (b) of the Act comply with the principles of natural justice and act in a manner that is reasonable having regard to its investigative function.

[10] I am satisfied that the Authority has jurisdiction to separate issues and determine them as a preliminary matters. The focus therefore is whether it should do so in this case.

Should the Authority separate and determine the issue of assignment to and enforceability by the second applicant of the restrictive covenant as a preliminary issue?

[11] The progress of this matter has, for a variety of reasons that are known to counsel, been protracted. Third party disclosure has now been completed. There is a process in place to consider what orders are required to preserve confidentiality for the sale and purchase agreement. There has been timetabling for a second amended statement of problem and statement in reply. It has been confirmed that counsel and witnesses including Mr Chong who is in Australia are available to attend an investigation meeting in June 2013 in Dunedin. Three days have been set for an investigation meeting on 18, 19 and 20 June 2013.

[12] Mr Churchman submits that a finding on the preliminary issue in the respondent's favour must dispose of the claims the second applicant could have against the respondent and the focus of the final investigation meeting would then be solely on the claims by the first applicant and on the period of two months after the employment relationship ended and before the sale took place. He goes further to submit that it may dispose of the whole proceeding.

[13] Mr Towner and Ms Coates in their submissions say that an investigation into the proposed preliminary issue will increase the need for judicial intervention into the matter because regardless of the outcome of the proposed preliminary issue it will not affect any aspect of the first applicant's claim and a full investigation will still be required into each element of that claim. For example the Authority will still need to consider the terms of the respondent's employment agreement, alleged breaches, enforceability of the restraint of trade clause and any remedies for breach. On that basis Mr Towner and Ms Coates submit that this is a different situation from other threshold issues the Authority routinely determines such as employee or contractor status and whether a personal grievance was raised within 90 days.

[14] I accept that a decision of the proposed preliminary issue in this matter would in all likelihood not result in the end of the litigation between the parties. The Authority will still need to investigate claims that there were breaches of employee obligations including whilst the relationship between the first applicant and respondent was still on foot as well as the period that followed the end of the relationship until the sale of the first applicant's business. I do accept that issues of loss may, if any preliminary determination was in the respondent's favour be more limited but the Authority would still need to hear evidence about loss.

[15] Counsel also addressed the form of any preliminary hearing in their submissions.

[16] Mr Churchman during the most recent telephone conference with the Authority indicated his preference was that the preliminary matter be dealt with on the papers. He submitted that what needed to be considered by the Authority was limited to legal submissions and the sale and purchase agreement because the circumstances of the respondent's departure were not in dispute.

[17] Mr Towner and Ms Coates were of a different view in their submissions. They submitted that it is premature for Mr Churchman to suggest that was all that would be required to determine the proposed preliminary issue and that the Authority would be better placed to investigate the proposed preliminary issue in the context of a full investigation into the substantive claim following the provision of evidence. They said that this would help to avoid a situation that occurred in *PGG Wrightson Ltd v Jary* [2008] ERNZ 476 where the Full Court declined to express a view whether PGG Wrightson is entitled to enforce the covenant in restraint of trade against Mr Jary

on the limited facts agreed by the parties. Mr Towner and Ms Coates are of the view that an investigation meeting of about one day's duration would be required to present legal submission and affidavit evidence about the proposed preliminary issue and that would not save time or reduce costs ultimately.

[18] It was confirmed in *Jary* by the Court that the Authority did have jurisdiction to determine a matter about assignment as the essential character of the claim arose out of the employment agreement as it does in this matter. Importantly the Employment Court after considering a number of decided cases, numerous texts and academic articles were unable to discern a common thread of sufficient strength and clarity to be stated as a principle of general application to the issue of whether the benefit of a restraint of trade can be assigned by the employer to a third party and enforced by that third party against the employee. *Jary* and an Employment Relations Authority determination *Precision Tracking (NZ) Limited v Tait* CA 216/09 appear to be the only two cases in the employment jurisdiction where the issue of assignment and enforcement of a restraint of trade covenant have been considered.

Determination

[19] The most important factor in deciding whether to grant this application or not is whether there would be a cost benefit to the parties in separating off the proposed preliminary issue and determining it. If there is not then the application should not be granted.

[20] I accept that Mr Churchman made the application with the view to reducing cost and expense for the respondent and I agree with his submission that determination of the proposed preliminary issue on its face involves limited disputed facts but it does involve issues of law with some complexity. If there was a preliminary determination in favour of the respondent then any evidence about loss would be more confined.

[21] Notwithstanding that I think there is a real risk in this case that if the Authority was to grant the application it could result in further delay and expense to the parties and may jeopardise the investigation meeting dates set for June 2013.

[22] Firstly, any preliminary determination would not in all likelihood end the litigation before the Authority.

[23] Secondly, Mr Towner and Ms Coates say that there would be a need for an investigation meeting rather than having the proposed preliminary matter determined on the papers as Mr Churchman suggests. The importance of the outcome to the parties is such that the Authority would in those circumstances in all likelihood hold an investigation meeting or, at the very least, give counsel an opportunity to be heard by way of telephone conference. That would mean the parties would incur additional hearing time of half to one day with the expense on top of that of preparation and if an investigation meeting in Dunedin, travel costs. I am not satisfied that even if the result was favourable to the respondent the substantive meeting would be so significantly reduced in length as to persuade me that it was more cost effective on that basis to determine the preliminary issue.

[24] Thirdly, there is no principle from the Employment Court of general application about the assignment of and enforcement by, a third party of the benefit of a restrictive covenant in an employment agreement. In those circumstances the likelihood of a challenge from any preliminary determination is greatly increased. Indeed I would conclude that a challenge is likely and with that comes a possibility of further delay that could impact on the set dates for the investigation meeting. The desired effect therefore of the preliminary determination to save costs and further delay would not have been achieved.

[25] When I consider all of the above factors they outweigh the benefits of a determination on the proposed preliminary issue.

[26] The application is therefore dismissed.

Costs

[27] I reserve the issue of costs and these will be dealt with after the substantive determination.

Helen Doyle
Member of the Employment Relations Authority