IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 43
ARC 32/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	HALLY LABELS LIMITED Plaintiff
AND	KEVIN POWELL Defendant

Hearing: 10 and 13 May 2011
(Heard at Auckland)

Counsel: Chris Patterson and Shelley Kopu, counsel for plaintiff
Andrew Gallie, counsel for defendant

Judgment: 13 May 2011

ORAL JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff has challenged the Employment Relations Authority's refusal to grant it an interim injunction restraining the defendant from competing with it. The Authority will be investigating the substantive matter on 26 May 2011. The interim injunction is being sought to uphold a restraint contained in an employment agreement made on 11 May 2010, which contained the following clause:

> **9.0 Restraint on post-employment activities.**
>
> The parties recognise that the employer has a legitimate proprietary interest in the customers, procedures and practices of the company and agree to the following restraints in recognition of national status and seniority of the employee and the significance of those proprietary interests to the employer.
>
> 9.1 The Business Development manager will not, for a period of one year from the termination of his employment, directly or indirectly solicit or entice or attempt to solicit or entice any customer of the Company to place business with any competitor of the Company, nor

will she aid or abet any other person to so solicit or entice any customer of the Company.

9.2 The Business Development Manager shall not at any time during the term of this employment, or for a period of twelve months after the termination of this employment, either on the his or own account or for any other person, firm, or company, solicit or endeavour to entice away from or discourage from being employed by the Company, any person who shall at any time during the period of six months before the termination of this Agreement, have been an employee of the Company, without the express written consent of the Company.

9.3 During the term of this Agreement, and for the period of twelve months after the termination of this Agreement, the Business Development Manager shall not either on his own account or for any other person, firm or company, employ in any competitive capacity any other employee who was at any time for a period of six months proceeding termination of this Agreement, an employee of the Company without the express written consent of the Company.

9.4 The Company may within 7 days of giving or receiving notice of termination of the employment invoke the following sub-clause the consideration for which will be the making of a payment to Business Development Manager in the sum of six months base salary:

9.4.1 The Business Development Manager shall not, for a period of 12 months after the termination of this agreement (for whatever reason); carry on, be connected, engaged or interested either directly or indirectly or alone with any other person or persons, (whether as Principal, Partner, Agent, Director, Shareholder, Employee, or otherwise), in any business in the adhesive label manufacturing industry, within New Zealand or Australia that is in competition, either directly or indirectly, with the Company.

[2] The agreement also contains an embargo on the use by the defendant of confidential information which is comprehensively defined.

Factual Background

[3] It appears that the facts are not greatly in dispute and the defendant has accepted the chronology of events annexed to the submissions filed by counsel for the plaintiff. The following factual findings, based as they are on affidavits and without the benefit of cross-examination of witnesses, should be regarded as tentative only.

[4] The plaintiff (Hally) is a privately owned adhesive labelling company, with over 45 years experience in Australasia. It has assets sufficient to support an

undertaking as to damages. It develops, manufactures and supplies adhesive labels to a wide range of customers and has a strong market position in supplying labels to the meat sector.

[5] The defendant joined a predecessor company of the defendant in 1989. After 2002 he became market manager, specialising in the meat and supermarket sectors and in developing relationships with existing and new customers until his appointment as Business Development Manager (New Zealand) in April 2010. The same restraint of trade that is contained in the 2010 employment agreement was included in an agreement dated 12 September 2005, when the defendant was national sales manager. Prior to that time, and from 1 July 2002, the plaintiff was subject to the same restraint but it was geographically limited to New Zealand only.

[6] By a letter dated 6 December 2010, the defendant received an offer of employment from Geon Group Ltd (Geon), a competitor of the plaintiff in the label industry, subject to there being no restraint of trade obligations on the defendant's part, with a commencement date between 1 February and 30 June 2011.

[7] On 7 December 2010 the defendant, by a telephone call to his manager, David Welch, and a subsequent email, resigned from his employment. He openly disclosed to Hally that he intended to take up employment at Geon.

[8] The plaintiff alleges that immediately before the defendant submitted his resignation on 7 December the defendant attended a meeting with a major supplier of Hally's in which commercially sensitive information for the 2011 year was presented and discussed. After submitting his resignation, it is alleged the defendant attempted to attend a monthly strategy meeting until he was instructed by Hally's Chief Executive Officer, Trevor Kamins, not to attend because of the resignation.

[9] The defendant was placed on garden leave through to the end date of his employment on 7 February 2011.

[10] It is also alleged that at a meeting on 9 December, representatives of the plaintiff met with the defendant to discuss the role that he had been offered at Geon,

at which point the defendant acknowledged that he understood the restraint of trade but sought to alter its terms. He was allegedly told that Hally would consider its position and get back to him.

[11] It is common ground that on 13 December, by way of a letter, the plaintiff invoked the restraint of trade. The letter stated Hally would meet with the defendant to discuss the implications of this. Mr Gallie, the defendant's counsel, responded on 17 December by a letter in which he raised issues as to the reasonableness and therefore the enforceability of the restraint, the possibility of the defendant seeking a declaratory judgment as to its enforceability and in which he invited the plaintiff to consider a reduction in the restraint from 12 to 6 months with payment reduced to 3 months.

[12] There was no reply to the 17 December letter until 18 February 2011. Mr Patterson, counsel for the plaintiff, responded apologising for the delay, rejecting the offer, indicating that the plaintiff might consider a variation providing its commercial interests were adequately protected and inviting the defendant to put forward an alternative proposal.

[13] Mr Gallie responded on 1 March noting that it had taken two months for a response to his letter, repeating the defendant's offer and stating:

> Time is now of the essence in terms of bringing this issue to a conclusion and to that end we shall need to hear back from you in response to this letter no later than close of business 8 March 2011.

[14] Mr Patterson responded on 9 March maintaining the plaintiff's refusal to accept the defendant's offer and advising that should the defendant breach the terms of the restraint, all steps necessary to enforce it would be taken by the plaintiff. Again, an alternative proposal was invited.

[15] Mr Gallie responded to Mr Patterson on 10 March stating that clause 9.4 of the agreement required the payment to the defendant of six months' salary, that the clause was invoked on 13 December and that, while time was not expressly stated to be of the essence, it was implicit that the payment would be made either upon the

plaintiff invoking the subclause, or before the end of the employment, which was 7 February 2011. The letter claimed that payment of the requisite consideration was an essential term, the failure to pay constituted a breach of the restraint clause which substantially reduced the benefit and increased the burden of the agreement for the defendant and made the benefit and the burden of the agreement substantially different from that which was agreed upon. It advised that the defendant accordingly exercised his right to cancel the restraint agreement pursuant to s 7(3)(b) of the Contractual Remedies Act 1979 and that he no longer considered himself bound.

[16] Mr Patterson responded by an email on Monday 14 March agreeing that there was no express time for payment in the agreement and stating that his client had decided to continue paying the defendant, as it had previously done, by monthly payments. The plaintiff did not accept the cancellation and reserved its position to take steps to enforce the restraint unless the plaintiff gave an undertaking to comply by 21 March 2011. Mr Gallie replied on 18 March, maintaining the claim that the restraint agreement had been brought to an end, and rejecting a part payment of the first of what the plaintiff was stating would be 12 consecutive monthly payments of one half of one month's base salary. His facsimile recorded the defendant's agreement that he would not act in breach of the balance of the provisions of clause 9, which remained extant, notwithstanding the cancellation of clause 9.4.

[17] Mr Patterson responded on 23 March offering to have the balance of the restraint payment paid into his instructing solicitor's trust account, to be released when the defendant confirmed his acceptance of the terms of the restraint and revoked his purported cancellation. The letter also noted that the plaintiff had not received any notice of the proposed cancellation. Time for confirmation was extended until Thursday 24 March 2011. When no undertakings were received, the plaintiff filed its application for interim relief in the Authority on 30 March 2011. It is unfortunate that the investigation meeting did not take place until 2 May 2011. The Authority issued a very prompt determination[1] on 5 May 2011 declining interim relief.

The determination

[1] [2011] NZERA Auckland 181.

[18] The Authority found that, in the present circumstances, the rule of equity discussed in the judgment of McGrath J in *Steele v Serepisos*[2], that notice must be given stipulating a certain time for completion and making time of the essence, had no application. This was because the restraint provisions in the agreement could be construed as reasonably clearly providing a time when the consideration was to be paid: either when Hally invoked the restraint on 13 December 2010, or on 7 February 2011, the start of the period of restraint on the termination of employment.[3] As an alternative, the Authority found that this was a term to be implied in accordance with the business efficacy test contained in *Attorney-General v NZ Post Primary Teachers Assn.*[4]

[19] The Authority found that the circumstances fell within s 7 of the Contractual Remedies Act 1979 and that the defendant was entitled to cancel the restraint provision on the grounds of its breach by Hally.[5]

[20] The Authority found that it was strongly arguable that the restraint provision had ceased to bind the defendant and therefore he was not in breach by commencing work for Geon. The Authority noted that, to the extent its conclusion was partly factual, the issue was not one that could be finally determined on the untested affidavit evidence available at this interim stage. It found that the provisions restraining the defendant appeared to have been reasonable at the time the restraint was entered into as the plaintiff had trade secrets which made a restraint provision reasonably necessary and breach of the restraint was likely to cause loss of a competitive edge and business. In addition, the Authority found that there was a serious issue to be tried, that damages would not provide the plaintiff with an adequate remedy and that there was uncertainty about the defendant's ability to meet awards of damages set at high levels.[6]

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[2] [2006] NZSC 67, [2007] 1 NZLR 1 at [120].
[3] At [24].
[4] [1992] 1 ERNZ 1163 (CA) at 1168.
[5] At [32].
[6] At [36]-[38].

The principles governing interim injunctions

[21] As Mr Patterson submitted, the legal tests are not in dispute. As this matter concerns the interim enforcement of a restraint of trade provision, for the Court to grant the interim relief sought, it must be satisfied that:

(a) There is a serious question to be tried;

(b) That the restraint in question is reasonable;

(c) That there is no other remedy available to the plaintiff;

(d) That the balance of convenience favours the granting of the injunction;

(e) That the overall justice of the case favours the granting of the injunction.[7]

Was the restraint reasonable?

[22] Mr Gallie advised that the defendant does not intend to cross-appeal but will wish at the substantive investigation to contend strongly that the restraint was unreasonable and therefore unenforceable. For present interim purposes however, he accepted that the plaintiff had established as a serious issue that the restraint was reasonable as to its geographic extent and duration and was necessary to protect proprietary interests of the plaintiff at the time it was entered into. All these matters will be at issue at the substantive investigation.

[23] There may also be an arguable issue as to the adequacy of consideration in which the matters canvassed by the Court of Appeal in *Fuel Espresso Ltd v Hsieh*[8] could become relevant.

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[7] *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205 and *Marshment v Sheppard Industries Ltd* [2010] NZEmpC 98.
[8] [2007] ERNZ 60 at [20].

Adequacy of damages

[24] Mr Gallie also conceded that there was no other remedy readily available to the plaintiff and that damages were unlikely to be an adequate remedy. The issues upon which Mr Gallie concentrated were the balance of convenience and the overall justice of the case. However, in doing so, Mr Gallie submitted that certain issues that the defendant had raised were seriously arguable as defences to the application. In particular, counsel supported the defendant's contention that he had properly cancelled the agreement for breach and that the restraint accordingly was no longer binding upon him.

Serious question

[25] Insofar as the serious issues to be tried at the substantive investigation bear on both the balance of convenience and the overall justice of the case, I summarise them as follows but without making any determination at this point until the matters can be fully argued and any disputed factual matters can be resolved.

[26] It is conceded there is a serous issue to be tried as to the reasonableness of the restraint. There are the following additional issues as to the enforceability of the agreement.

Did the plaintiff breach the agreement?

[27] The issue of whether the plaintiff breached the agreement by not paying the consideration for the restraint as required, was central to two grounds of defence:

1) Whether the defendant was entitled to rely on the failure to pay the consideration as a defence to the plaintiff's enforcement of the restraint;

2) Whether such breach entitled the defendant to cancel the agreement.

[28] The breach alleged by the defendant was the failure by the plaintiff to pay the six months' base salary on 13 December 2010 when it invoked the restraint clause or, at the latest, on 7 February 2011 when the employment ended. I agree with the

Authority that the wording of cl 9.4 arguably contemplates the making of the entire payment at the time of the invocation of the subclause. I also accept that the defendant's alternative argument that the "business efficacy" test supports the implication that the time for payment is as asserted by the defendant, is seriously arguable.

[29] However, so is the plaintiff's contention that the restraint can be construed to require payment to be made at the time the employee acknowledges being bound by the restraint or has made express demand for payment. In this regard Mr Patterson relied on the statement in Burrows, Finn and Todd, *Law of Contract in New Zealand*:[9]

> If the original contract specifies no time for completion the law implies that the time will be a reasonable time. However, the contract cannot be immediately discharged on the expiry of what the innocent party regards as a reasonable time: the innocent party must give notice requiring the other to complete within a further reasonable, but specified, time. The reason for this is that "it is undesirable that the rights of the parties should rest definitely and conclusively on the expiration of a reasonable time, a time notoriously difficult to predict".[10] As Cooke J said, the requirement of notice "makes for clarity and justice".[11]

[30] This passage relies on the statement of Cooke J, as he then was, in *Hunt v Wilson*, which was extensively discussed by the Supreme Court in the *Steele* case. Tipping J, in *Steele*, rejected the Court of Appeal's conclusion that it was not open to the vendors in that case "to cancel" the contract without having given the purchaser "fair notice" of their intention to do so and the "fair opportunity" to take steps to secure an easement over an adjoining neighbour which would have allowed the sub-division, upon which the agreement was conditional, to proceed.[12] He concluded that the vendors were not liable for breach of contract for having failed to give notice to the purchaser of their intention to treat the contract as discharged for non-fulfilment of the conditions. He found that such notice was not required by the terms of the contract itself and there was no proper or sufficient legal basis to require such

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[9] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at 580.
[10] *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 555 per Mason J.
[11] *Hunt v Wilson* [1978] 2 NZLR 261 (CA) at 273.
[12] At [36].

a notice in the absence of contractual entitlements.[13] A similar result was reached by Blanchard and Anderson JJ.[14]

[31] The lines of authority relied on for the requirement to give notice all came from the vendor and purchaser arena, not from the lines of authority dealing with employment cases, where different considerations may apply.

[32] There is a serious issue to be tried as to whether notice was required before the defendant could purport to cancel the agreement. This is especially so as the Contractual Remedies Act, to which I shall shortly move, contains no such express requirement.

[33] I note also that Tipping J stated:[15]

> It is conventional law that the vendors were entitled to rely on the non-fulfilment of the condition as a defence to an action on the contract. They were not obliged to cancel the contact in order to do so.

[34] That appears to be entirely consistent with the line of authority developed from the House of Lords decision in *General Billposting Company Ltd v Atkinson,*[16] which held that a repudiatory breach of contract by an employer released the employee from a restraint. *General Billposting* has been accepted by a number of leading British texts.[17] I find there is a serious issue to be tried as to whether the plaintiff can rely on the restraint if it is found that it breached the agreement by failing to provide the full consideration when required.

[35] However, as Mr Patterson observed, in one case in which this issue was examined, limited relief was granted restraining competition notwithstanding the argument that there was a repudiatory breach on the part of the employer, see *Grey Advertising (New Zealand) Ltd v Marinkovich.*[18] I also note the judgment of Phillips LJ in *Rock Refrigeration* casting doubt on the continuing influence of *General*

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[13] At [70].
[14] At [16] and [141] respectively.
[15] At [68].
[16] [1909] AC 118. See also *Rock Refrigeration Ltd v Jones* [1997] 1 All ER 1 (EWCA).
[17] See HG Beale (ed) *Chitty on Contracts* (30th ed, Thomson Reuters, London, 2008) at 16-101 and Edwin Peel *Treitel on the Law of Contract* (12th ed, Sweet & Maxwell, London, 2007) at 18-010.
[18] [1999] 2 ERNZ 844 at 858-861.

Billposting and particularly his comments about the special statutory context of employment law.[19]

Cancellation under the Contractual Remedies Act

[36] If it is found that the plaintiff had breached the agreement by failing to pay the six months' base salary when required, the next seriously arguable issue is whether the defendant was able to invoke the provisions of s 7 of the Contractual Remedies Act, which provide, insofar as they are relevant:

> (1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.
>
> …
>
> (3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if –
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> ...
>
> (b) a term in the contract is broken by another party to that contract; …
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> (4) Where … subsection 3(b) … of this section applies, a party may exercise the right to cancel if, and only if, -
>
> (a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to him; or
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> (b) the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be –
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> (i) substantially to reduce the benefit of the contract to the cancelling party; or
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> (ii) substantially to increase the burden of the cancelling party under the contract; or
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> (iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[19] At 18-20.

> (5) A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.

[37] Mr Gallie submitted the failure of the plaintiff to pay the consideration had the consequences set out in s 7(4)(b)(i), (ii) and (iii) of the Contractual Remedies Act and that the defendant therefore became entitled to cancel and did so by notice forwarded to the plaintiff on 10 March.

[38] Mr Patterson contended that the timing of the payment was not essential to the defendant and that the only time that the issue of payment was raised at all was in the notice by which the plaintiff purported to cancel the restraint. Prior to that point in time he submitted that there were issues only to the reasonableness of the restraint and proposals from the defendant to renegotiate its terms.

[39] Mr Patterson also contended that there was a lack of substantial burden on the defendant and that the plaintiff had made it clear that it did intend to perform its obligation to pay the consideration and the only issue was timing. He submitted that at the time of cancellation, the decrease in the benefit to the defendant by the non-payment amounted to less than $500 being the loss of the benefit of the use of the money which, he submitted, did not substantially increase the benefit to the defendant.

[40] The difficulty that those submissions may encounter in the substantive investigation is that there was no guarantee at the time of the cancellation that the plaintiff was intending to pay the full consideration. The plaintiff's subsequent offer to drip feed the consideration by twelve equal payments, provided the defendant accepted the restraint in its entirety, may arguably have had the effect of substantially reducing the benefit of the consideration and increasing the burden of the restraint on the defendant. Further, it was a conditional offer. If the defendant is successful in establishing that payment ought to have been made at the time of the invocation of the restraint or at the latest when his employment came to an end, it is arguable that the failure to pay and the subsequent conditional offer that it would be paid by twelve monthly instalments, made the benefit or burden of the agreement substantially different from that contracted for.

[41] The plaintiff also claims that the defendant affirmed the contract by negotiating about the restraint and pursuant to s 7(5) was therefore not entitled to cancel the agreement.

[42] Mr Gallie submitted that this is a question of fact as to whether there has been a real and genuine affirmation with an intention to affirm the agreement. He submitted there is nothing in the conduct of the defendant that could be taken as affirming the breach and in particular: the defendant put a proposal for variation to the plaintiff; after the passage of two months it was rejected and by this time payment had fallen due; the defendant repeated the proposal making time of the essence but received no response within that time; the plaintiff then rejected the offer and the defendant cancelled.

[43] Mr Gallie submitted that there were no negotiations and the proposal by the defendant was rejected, with the plaintiff continually asserting the enforceability of the restraint and the defendant denying its enforceability. He submitted that as at 7 February, the last day for payment of the consideration, the plaintiff had yet to even respond to the initial proposal for variation. Therefore there was no conduct on the part of the defendant subsequently that could be taken as an election to affirm.

[44] I find that it is arguable that there was no affirmation of the contract after the defendant had full knowledge of the alleged breach of the term relating to payment. I therefore conclude that it is arguable that the defendant successfully cancelled the agreement and that the restraint is no longer enforceable.

Balance of convenience

[45] The issues canvassed by counsel under this heading also have relevance to the overall justice of the case.

[46] The present situation is that the defendant has been employed by Geon since 28 March 2011. There is an issue as to whether the work the defendant is performing for Geon, will, in any way, affect the plaintiff at this stage. Guy Phillips, the General Manager of Geon's subsidiary printing and manufacturing plant, trading

as Kiwi Labels Ltd, has deposed that the defendant will be fully engaged in servicing the existing clients that Mr Phillips previously served until he was appointed the general manager of the plant. He deposes that the defendant's duties in his employment over at least the next 12 month period will be focussed on the management and development of existing customers and at the same time identifying "cross-sell opportunities" that could be offered by the wider Geon group. I was advised that this concept involved the sale of other products from the Geon group which are said to be quite distinct from any service offered by Hally.

[47] Mr Welch, in an affidavit in response, claims that it is far too simplistic to assert that Hally's proprietary interests would not be affected if the defendant's initial focus was on Geon's existing customers. Mr Welch refers to Hally and Geon having mutual customers and his concern that the defendant, from his knowledge of Hally's affairs, could "lock in" in these accounts. He also deposes that irrespective of whether the defendant has been employed to "attack" Hally's customer base, the defendant will act in Geon's best interests, which may include not only looking after existing customers but attracting and developing new customers for Geon, presumably at Hally's expense.

[48] I do, however, derive some comfort from the evidence of Mr Phillips that at least in the interim period, if not for the entire twelve months, the defendant is not employed at Geon attacking Hally's customer base but only servicing existing clients of Geon. That is a matter which I consider properly does go to the balance of convenience in the period up to the determination of the plaintiff's substantive application.

[49] I do, however, accept the legitimacy of the plaintiff's concerns, as expressed by Mr Patterson, that although the investigation meeting is to start on 26 May, it may be some time before the final determination. I have no doubt, however, that the urgency of the matter will be impressed upon the Authority and the speedy determination of the interim injunction application within two days of the investigation meeting inspires confidence that the substantive determination will also be dealt with in a timely manner.

[50] If the defendant succeeds in establishing any one of its defences, the restraint will be unenforceable. It will therefore be a considerable burden to the defendant to be required to cease his existing employment pending the outcome of the plaintiff's substantive application. However, I also accept Mr Patterson's submission that this may be able to be partly redressed by the payment of all or part of the consideration required for the restraint, which the plaintiff now concedes the Court may impose as a condition of the interim relief the plaintiff seeks.

[51] I also accept Mr Patterson's submission that the restraint will not deprive the defendant of his ability to earn a living, but, as Mr Patterson conceded, it may be difficult for the defendant to obtain gainful employment for an indefinite period before the disposition of the substantive application. The payment of the consideration, if that is made a condition of any grant would give some assistance, but not totally alleviate the possible hardship.

[52] There is also a practical difficulty with the plaintiff's preferred position which is that the entire amount of the consideration should not be payable if the defendant does not accept the restraint. Although Mr Patterson has accepted any condition that the Court may impose as to payment of the consideration, it is clear that the plaintiff's preferred position is that it be held in trust and not be payable to the defendant if it turns out that the defendant is not bound by the restraint. If the plaintiff's concerns are met in any condition imposed this may not address the defendant's concerns as to the financial impact on him in the interim period if he is prevented from continuing to work for Geon.

[53] I accept Mr Patterson's submission that the evidence of Mr Phillips and the defendant does not expressly deal with the inconvenience that would be occasioned if the interim relief was granted and the defendant was required to cease his employment with Geon. The only express evidence is that if the defendant was constrained from working at Geon, he would be placed under immediate financial pressure as he is reliant on his income to service his debt obligations.

[54] Mr Patterson submitted that the defendant's employment with Geon was always dependent upon there being no restraint of trade obligations being owed by

the defendant, as the letter of offer demonstrated and that issue is not resolved. Mr Phillips, however, received the assurance of the defendant, through his counsel, that the restraint had been properly cancelled as a result of the non-payment of the consideration. The imposition of the interim relief sought by the plaintiff will have an impact on Geon which, on the material presently before the Court, has acted properly at all times. That is one factor which suggests that the balance of convenience may well favour the defendant and the status quo of his present employment at Geon.

[55] I take into account that the defendant has undertaken to abide by the balance of the provisions of cl 9 of the employment agreement which deals with the non-solicitation of Hally's clients and employees. Mr Gallie also drew attention to the strong confidentiality clause in the agreement which the defendant has likewise agreed to abide by.

[56] The imposition of interim relief at this late stage, shortly before the substantive investigation, would have considerable advantages for the plaintiff but consequent disadvantages for the defendant who is strongly asserting that he is not bound by the restraint. I conclude that the balance of convenience does not strongly favour either party. Although finely balanced, at this stage, if it favours anyone, it favours the defendant.

Overall Justice

[57] As I have indicated, the matters which have troubled me in dealing with the balance of convenience are also relevant in standing back from the detail of the case and considering the overall justice.

[58] Mr Patterson has contended that the plaintiff has done nothing which would disqualify it from being entitled to the interim injunction sought. I do not accept that submission. It is arguable that the plaintiff breached the terms of the agreement by failing to provide the entire consideration either on 13 December or 7 February.

[59] The second issue is whether there was unacceptable delay on the part of the plaintiff which should bear on the overall justice of granting interim relief.

[60] From his chronology, Mr Patterson pointed to three separate periods of delay:

1) The first from 17 December until 18 February: the period of time it took for the plaintiff to respond to the defendant's proposal for an alternative restraint;

2) The second from 19 February until 10 March: the period of time that the parties continued to negotiate, which was brought to a halt by the defendant's purported cancellation;

3) The third from 11 March until 30 March: the time between the purported cancellation and the filing for an interim injunction.

[61] I do not accept that the first period was reasonably explained by the plaintiff by the Christmas break and the subsequent absence of Hally's lawyer. There is no evidence that the plaintiff was aware at that stage that Geon's offer of employment was open for acceptance until 30 June 2011. The plaintiff was considering the offer made by Mr Gallie on the defendant's behalf.

[62] The defendant's evidence is that the first period of delay caused him considerable concern and frustration as he was trying to obtain certainty in a situation, where he had arguably been quite frank from the outset with his employer. The urgency of the situation, as explained by Mr Gallie in his letter, required a more timely response by the plaintiff and it is difficult to escape the conclusion that the plaintiff was using the garden leave period of two months for its benefit to increase the effectiveness of its restraint. That is perhaps a reason why it did not respond in a more timely fashion.

[63] Further, as Mr Gallie pointed out, the employment was still subsisting and the plaintiff continued to have a statutory obligation to deal with the defendant in good faith, in terms of s 4 of the Employment Relations Act 2000. This required the

plaintiff to be responsive and communicative (s 4(1A)(b)). I find it is arguable that the plaintiff failed to comply with its statutory duty.

[64] As to the second period, I accept Mr Patterson's submission that the communications between counsel unfortunately did not engage with the key issues of their respective clients. The defendant's communications did not highlight his concern about the failure to pay the consideration. The plaintiff's communications failed to address the plaintiff's concerns about the defendant's actions in having attended commercially sensitive meetings either when he was considering Geon's offer, or had accepted it and was intending to resign. Had the plaintiff explained what its commercial concerns were more clearly in the correspondence, the matter may well have been able to have been addressed by the assurances contained in the affidavits of both the defendant and Mr Phillips that the defendant's work for Geon would be limited to existing customers of that firm and would not impinge upon the plaintiff's commercial interests.

[65] That second period of delay was also unfortunate but would not, of itself, have affected the overall justice in favour of the defendant as the unacceptable first period does.

[66] As to the third period, this was adequately explained by Mr Patterson and I am satisfied that the plaintiff proceeded in a timely fashion to address the purported cancellation and then to file its proceedings. As I have already noted, it is unfortunate that the investigation meeting to deal with the interim application did not take place for more than one month. Had it taken place at an earlier time, then the effect of the plaintiff's unacceptable delay in the first period would not have been exacerbated.

Implied undertaking

[67] I have taken the statements on oath in the defendant's affidavit, supported as they are by the affidavit of Mr Phillips, that he will not compete with the plaintiff in the interim as, in effect, an undertaking on the defendant's part. In light of that implied undertaking, and on the totality of the matters I have considered I find that

the overall justice favours declining the interim relief in all the circumstances of the case.

[68] If however, the defendant resiles from that implied undertaking, he should so advise the Court within two working days from the date of this decision. This could influence me to find that the overall justice requires interim relief on the same limited basis on which I granted interim relief in the *Grey Advertising* case. The relief I could grant would be to preserve the current situation but would restrain the defendant from persuading or attempting to persuade any present client of the plaintiff to leave the plaintiff and join the defendant. It could go even further and prevent the defendant from communicating in any way with such clients unless they are already existing mutual clients of the plaintiff and Geon and then only strictly for the purposes of existing Geon work.

[69] However, on the basis that my assumption of an undertaking in the defendant's affidavits is correct, the interim relief application in this challenge would be declined. I reserve leave to refer the matter back to the Court if the defendant resiles from that implied undertaking.

[70] Costs are reserved.

B S Travis
Judge

Judgment delivered orally at 12.35pm on 13 May 2011