IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 101
ARC 33/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JANET POTTINGER First Plaintiff
AND	NINE DOT CONSULTING LIMITED Second Plaintiff
AND	KIRI CAREW Third Plaintiff
AND	KELLY SERVICES (NEW ZEALAND) LIMITED Defendant

Hearing:	19 June 2012 (Heard at Auckland)
Counsel:	Richard Harrison, counsel for plaintiffs Tim McGinn, counsel for defendant
Judgment:	28 June 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] This is a challenge brought on a de novo basis against a determination of the Employment Relations Authority granting interim orders in favour of the defendant in respect of the enforceability of restraint provisions in the first and third plaintiffs' individual employment agreements. The Authority made interim orders[1] enjoining the first and third plaintiffs personally or as shareholder, director, partner, employee or in any other capacity, directly or indirectly:

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[1] [2012] NZERA Auckland 150.

> Canvassing, soliciting, enticing or otherwise dealing with any employees, agents, officers or consultants of the employer, any of whom had been met as a result of Ms Pottinger's and Ms Carew's employment with Kelly Services, to end their employment or other relationship, or employ or engage them;
>
> Canvassing or soliciting any of Kelly Service's customers with whom Ms Pottinger and Ms Carew had dealings in the twelve month period prior to terminating their employment;
>
> Accepting business or work from any customers of Kelly Services with whom they had dealings in the twelve month period prior to terminating their employment;
>
> Procuring or assisting anyone else and in particular Nine Dot or Mr McLeod or any other employee of Nine Dot to breach any of the covenants contained within this paragraph.
>
> The term of this order is from the date of this determination [4 May 2012] until 14 September 2012 (unless varied before that date by further order of the Authority or the Employment Court).

[2] The plaintiffs filed a challenge against the Authority's determination. The substantive application is set down for an investigation meeting in the Authority on 14 September 2012. Issues have since arisen in relation to the scope of the customers referred to at paragraph two of the Authority's order. That issue is apparently before the Authority on 29 July 2012.

[3] The challenge in this Court was heard on an urgent basis.

Background

[4] Kelly Services is a recruitment consultancy company with offices throughout New Zealand. It offers recruitment services for clients requiring both temporary and permanent staff. It is part of an international operation.

[5] The first plaintiff, Ms Pottinger, was employed by Kelly Services in February 2010, as Branch Manager of the company's Greater South Auckland branch. The third plaintiff, Ms Carew, was employed in October 2010, initially as a consultant and then as Manager, Business Development (from 8 August 2011).

[6] Ms Pottinger is sole director of the second plaintiff company, Nine Dot Consulting Limited. Nine Dot Consulting is involved in consultancy work, offering recruitment services to its clients. It is focussed on permanent placements. Ms

Pottinger and her husband, Mr McLeod, operate Nine Dot Consulting. Ms Pottinger says that she did not have any involvement in the company during her employment with Kelly Services, despite the fact that she remained the sole director during this time.

[7] Both Ms Pottinger and Ms Carew were employed under individual employment agreements. Each agreement contained the following provisions:[2]

> 68/70 In consideration of Kelly Services (NZ) Limited entering into this Agreement of employment, you agree to enter into the restraints as specified below.
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> 69/71 In the event of termination of your employment by either party you agree that you will, for a period of six (6) months from the date of termination, not personally or as a shareholder, director, partner, employee or in any other capacity, directly or indirectly:
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> - Canvass, solicit, entice or otherwise deal with any employees, agents, officers or consultants of the employer any of whom you have met as a result of your employment with the employer to end their employment or other relationship, or employ or engage them;
> - Canvas or solicit any of the employer's customers with whom you had dealings in the twelve (12) months prior to terminating your employment;
> - Accept business or work from any customers of the employer with whom you had dealings in the twelve (12) months prior to terminating your employment;
> - Procure of assist anyone else to breach any of the covenants contained within this paragraph.
>
> 70/72 The employee acknowledges that these non-solicitation covenants are reasonable for the protection of the employer's business. The employee also acknowledges that the employee has received consideration for these covenants by the salary and other benefits provided by the employer.
>
> 71/73 The several covenants contained in paragraph 69 are separate covenants. If any of the covenants are unenforceable or illegal, that will not affect the remaining covenants.

[8] Ms Pottinger and Ms Carew resigned on 11 March and 14 March 2012 respectively. Ms Pottinger advised Kelly Services by email that she intended to return to work for Nine Dot Consulting. Ms Carew advised her resignation by way of letter dated 14 March 2012. She also advised that she was intending to work with

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[2] Clause numbers relate to each of the plaintiffs' employment agreements, the first and third plaintiffs respectively.

Nine Dot Consulting. Kelly Services responded by terminating their employment with immediate effect. Ms Pottinger's employment was terminated on 12 March 2012. Ms Carew's employment was terminated on 14 March 2012. Kelly Services relied on the following provisions in each of the plaintiffs' employment agreements:

> 55. **When Employee has Given Notice and Next Employer will be a competitor:** The employer has elected not to enter into a restraint of trade restricting the employee from working with a competitor when this agreement ends.
>
> 56. In the event that the employee gives notice that he or she is ending the agreement, and the employee will be working for a competitor, the employer may terminate the agreement immediately, without requiring the employee to serve out the period of notice and without making any payment in lieu of notice.

The applicable test

[9] In determining an application for interim orders the Court must have regard to: [3]

- Whether there is a serious question to be determined;
- Where the balance of convenience lies between the parties in the period until the Authority determines the substantive application; and
- The overall justice of the case.

[10] The purpose of interim relief is to protect a plaintiff (in this case the defendant) against injury for which it cannot be adequately compensated in damages in the event that it succeeds at trial. The remedy is discretionary. Protection for the plaintiff needs to be balanced against the damage that might be done to a defendant, through being prevented from exercising its rights, if the plaintiff fails at trial.

[11] Mr Harrison, counsel for the plaintiffs, observed that given the Authority is not investigating the substantive application before September the reality is that the interim decision will effectively be a de facto substantive decision about the rights of the parties.[4] That is not necessarily so. While the six month period referred to in cls

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[3] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *Port of Wellington Ltd v Longworth* [1995] 1 ERNZ 87 (CA) at 91; *Hally Labels Ltd v Powell* [2011] NZEmpC 43, (2011) 8 NZELR 532 at [21].
[4] *Green v Transpacific Industries Group (NZ) Ltd* [2011] NZEmpC 6, (2011) 8 NZELR 238 at [2].

69 and 71 of the plaintiffs' employment agreements will have expired by the time the substantive claim comes before the Authority, issues relating damages remain live.

[12] The immediate issue for the Court is whether the threshold for the grant of interim orders has been satisfied. While the timeframe involved is relevant to the balance of convenience and overall justice of the case, I do not consider that it fundamentally alters the test that must be applied at an interim orders stage.

Summary of parties' submissions

[13] The plaintiffs contend that the restraints are unenforceable. In particular, it is submitted that the immediate termination of the first and third plaintiffs' employment following notice of their resignation amounted to a fundamental breach which rendered the restraint unenforceable; that the application of the restraint is uncertain as to the identity of the customers to which it relates; and that the length of the restraint is unreasonable. It is also submitted that the reasonableness of the restraints is undermined by the first plaintiff's lack of awareness of the restraint at the time she entered the employment agreement and that there was a lack of consideration for the restraint contained within the third plaintiff's most recent agreement. The plaintiffs further submit that the restraints are unreasonable having regard to the nature of the plaintiffs' roles with the defendant company and the proprietary interests that it seeks to protect.

[14] The plaintiffs seek orders setting aside the Authority's interim orders or, alternatively, modifying the orders that have been made.

[15] The defendant submits that the Authority was correct in concluding that it had established to the required threshold that it has a proprietary interest to protect and that the covenants in issue were reasonably necessary to protect those interests. It is submitted that there is a strongly arguable case that the third plaintiff aided and abetted, and encouraged by the first and second plaintiffs, has actively breached the covenants and misused confidential information belonging to the defendant in so doing. This, it is said, is relevant to a consideration of the overall justice of the case.

The law

[16] Contractual provisions restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the employer in the public interest: see *Gallagher Group Ltd v Walley*,[5] citing *Mason v Provident Clothing & Supply Company Ltd.*[6]

[17] The onus of establishing that a restrictive provision is reasonable is on the employer.[7] Such a provision should be no wider than is required to protect the party in whose favour it is given.[8]

[18] Restraints are enforced only to the extent required to protect a proprietary interest of the employer. The nature of the employee's role and the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.

[19] The issue for the Court, in the context of an application for interim orders, is whether a seriously arguable question arises as to the likely enforceability of the covenants at issue in relation to the first and third plaintiffs.

Proprietary interest?

[20] An employer is entitled to impose a restraint to protect proprietary interests which require protection: *H & R Block Ltd v Sanott.*[9]

[21] The defendant argues that it has a legitimate proprietary interest to protect and that the covenants at issue are reasonably necessary to protect those interests. The defendant says that its proprietary interest is in confidential information, and in related business and trade connections.

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[5] [1999] 1 ERNZ 490 (CA) at [20].
[6] [1913] AC 724 (HL) at 733.
[7] *Gallagher* at [28].
[8] *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731, [2001] ERNZ 46 (CA) at [28].
[9] [1976] 1 NZLR 213 at 218.

[22] As Branch Manager Ms Pottinger's responsibilities included implementing, reviewing, and following up on the effectiveness of marketing and sales programmes, with a view to the retention of existing major accounts, existing and medium to small account markets, and the development of both new major account business and new mid to small business accounts. She was also responsible for recommending and implementing approved local sales and marketing strategies, to ensure that Kelly Services' profit and share of market objectives were met or exceeded.[10] The defendant says that Ms Pottinger had access to a considerable amount of confidential client information, including in relation to their contact details, the nature of their work and their specific needs. It is also said that she had access to a considerable amount of information relating to sales, development, pricing, strategies, budgets and marketing programmes.

[23] Ms Pottinger accepts that she had dealings with a number of the defendant's clients (including some who are described as "top 10" clients) and had access to a quantity of confidential information during her time with Kelly Services, given the nature of her role. She says that these dealings were limited and were focussed on the supply of temporary labour, and were not related to permanent recruitment (which is the area in which Nine Dot Consulting operates).

[24] Ms Carew was initially a consultant with Kelly Services, and as such had a strong focus on developing client relationships. Her subsequent appointment as Business Development Manager carried more strategic responsibilities. According to the job description for this role, two of her primary objectives were to expand and enhance Kelly Services' business relationship with local and national customers to contribute to enhanced sales performance, profitability, customer satisfaction and market share; and to meet or exceed personal gross profit and share of market objectives on an ongoing basis through new business development and key account identification. Ms Carew accordingly retained business connection related obligations, although with a wider focus than in her role as a consultant. It appears that much of her time was taken up with visiting prospective customers and following up work that would then be undertaken by consultants. She confirms that

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[10] This is reflected in the first plaintiff's job description.

she continued to undertake consultancy work for one client after she took up the business development position.

[25] The plaintiffs drew a distinction between the role of consultants and the Branch Manager and Business Development roles they held. The evidence of Kelly Services' Director of Human Resources, Ms Wallace, was that the expectation placed on consultants to develop relationships with clients from the company's client base extends to more senior roles. Her evidence was that Ms Pottinger and Ms Carew had access to a considerable amount of confidential information relating to Kelly Services' client base, client business needs, key contacts with clients and candidate databases. The utility of this sort of information, to which the first and third plaintiffs had access, was that it enabled them to develop relationships with the clients and to maximise business opportunities for the defendant company.

[26] Both Ms Pottinger and Ms Carew emphasised the differences between the type of work they undertook while employed with the defendant and the focus of Nine Dot Consulting's business. In particular, they pointed out that Kelly Services' activities are primarily directed at temporary placements and Nine Dot Consulting is engaged with permanent placements.

[27] Ms Randell's evidence (as Business Services Manager with Kelly Services) cast some doubt on the validity of the distinction which the plaintiffs sought to draw. She says that the national budgeted ratio for Kelly Services is 34.7% permanent and 65.4% temporary, and that Ms Pottinger's most recent budget at Kelly Services, based on her gross profit, reflected a 69/31 split in favour of temporary placements. She also makes the point that the distinction is not clear cut, as there is a degree of cross-over between permanent and temporary recruitment. In this regard, clients who engage the defendant to provide temporary placements may subsequently engage the company in relation to permanent placements. Ms Randell described temporary clients as "soft calls", as they become a fertile source of permanent placements. This is because the company already has a client relationship with them.

[28] Kelly Services submits that as a result of the positions held by Ms Pottinger and Ms Carew, and the information they had access to, they are in a strong position to harm the defendant by unfair competition.

[29] The recruitment consultancy industry is highly competitive. It operates on established relationships. I am satisfied that the defendant has established a strongly arguable case that during the course of their employment Ms Pottinger and Ms Carew had access to a considerable amount of information that was pivotal to the development and retention of Kelly Services' customer relationships and recruitment business. It is strongly arguable that Kelly Services has a proprietary interest in this information, which the restraint provisions are designed to protect.

Fundamental breach?

[30] The plaintiffs submit that the defendant fundamentally breached their employment agreements and that this amounted to a repudiation rendering the restraints unenforceable. Alternatively, it is submitted that the alleged fundamental breach was relevant to a consideration of the balance of convenience and/or the overall justice of the case.

[31] Mr McGinn, counsel for the defendant, accepted in principle that if the defendant had repudiated the first and third plaintiffs' employment agreements and the repudiation was accepted, then the plaintiffs would be discharged from their restraints. However, the defendant submitted that the exercise of an express contractual term (providing for immediate termination in specified circumstances) could not amount to repudiation.

[32] I accept Mr Harrison's submission that justification for termination of the plaintiffs' employment can be challenged under s 103A, in any personal grievance claim raised by Ms Pottinger or Ms Carew under s 114 of the Act. However, it is clear that the test of justification under s 103A applies to the personal grievances established by the Act in ss 103(1)(a) and (b). This proceeding is not a personal grievance claim. Even if the plaintiffs could establish such a claim, the consequence would be a statutory remedy under s 123 of the Act, not an order invalidating or voiding the employment agreement or the restraints.

[33] Mr Harrison referred to *General Billposting Company Ltd v Atkinson*,[11] as authority for the proposition that an employee who is wrongfully dismissed in repudiation of an employment contract is entitled to accept that repudiation, claim for damages, and is no longer bound by any contractual restraint of trade. In *General Billposting* an employee had successfully brought an action for wrongful dismissal and then commenced business on his own behalf. His original contract of service contained a clause restricting his right to trade within a specified area for two years after his engagement with the company terminated. The employer brought an action against him for breach of the restraint of trade provision. The House of Lords held that because the employer had repudiated the contract, Mr Atkinson was entitled to accept the repudiation, sue for damages, and was no longer bound by the restraint of trade.

[34] *General Billposting* has been considered in a number of cases. In *Grey Advertising (New Zealand) Ltd v Marinkovich*,[12] the Court accepted that there was a serious issue to be tried as to whether the restraint in that case would survive if the defendant succeeded in his breach of contract claims concerning constructive dismissal. Despite this, the Court ordered interim injunctions restraining the defendant, finding that this issue was merely a factor to be taken into account in considering the strengths and weaknesses of the parties' cases.[13]

[35] In *Hally Labels Ltd v Powell*,[14] the Court accepted that there was a serious issue to be tried as to whether the employer could rely on the restraint when it had failed to pay consideration of six months' salary upon invocation of the restraint as the contract required.[15] And in *Green v Transpacific Industries Group (NZ) Ltd*,[16] the Court examined whether the failure of the employer to pay compensation and/or the placement of the employee on garden leave were fundamental breaches of the employment agreement disentitling the employer to rely on restraints of trade.[17]

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[11] [1909] AC 118 (HL).
[12] [1999] 2 ERNZ 844.
[13] At 861.
[14] [2011] NZEmpC 43, (2011) 8 NZELR 532.
[15] At [34].
[16] [2011] NZEmpC 6, (2011) 8 NZELR 238.
[17] At [18]-[25].

[36] However, in each of these cases where this issue has been raised, the allegation has been that the employer had breached a fundamental term of the employment *contract*. That is not the case here. Rather, the allegation advanced on behalf of the plaintiffs is of a failure to comply with s 103A at the time the dismissals occurred and a breach of the defendant's statutory duty to act as a fair and reasonable employer.

[37] Further, none of these cases involved an employment agreement containing a clause providing for immediate termination. The first and third plaintiffs' agreements did. Clause 56 expressly provided for immediate termination in the event that the employee gave notice and in circumstances where they would be working for a competitor.

[38] Even if Mr Harrison is right, it is unclear whether the restraints would be held void. In *Green*, Chief Judge Colgan observed that the employee's contention that a fundamental breach voided restraints was itself "very arguable".[18]

[39] In *Rock Refrigeration Ltd v Jones*[19] Philips LJ doubted the continued general application of *General Billposting*.[20] He expressed the view that *General Billposting* accorded "neither with current legal principle nor with the requirements of business efficacy."[21] He also emphasised the special statutory context of employment law, which provides the opportunity for employees to gain compensation for unfair dismissal, and observed that it did not seem reasonable to also prevent the employer from protecting its confidential information or goodwill in such circumstances.[22] In my respectful view there is considerable force in these observations.

[40] I conclude that while it is arguable that an established repudiation would result in a finding that the restraints contained within the plaintiffs' employment agreements were void following *General Billposting*, that argument is weak.

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[18] At [18].
[19] [1997] 1 All ER 1 (EWCA).
[20] *Hally Labels* and *Grey Advertising* refer to *Rock Refrigeration*, while accepting that the issue was seriously arguable.
[21] At 18.
[22] At 20.

[41] I accept Mr Harrison's alternative argument that a failure to comply with s 103A may be relevant to evaluating the conduct of the parties when making an assessment of overall justice.

The length of the restraint

[42] Mr Harrison submits that the six month time period specified in the first and third plaintiffs' employment agreements is unreasonably long, and contends that a three month timeframe would be appropriate. Mr McGinn submits that six months is reasonable having regard to the nature of the interests sought to be protected and the nature of the first and third plaintiffs' roles.

[43] At an interim orders stage the Court is not assessing the ultimate question, namely whether the six month period contained within the employment agreements is or is not enforceable. Rather, the focus of the inquiry is on whether there is a seriously arguable case that it is.

[44] It is well accepted that a restraint must do no more than is necessary to reasonably protect the employer's interest.[23] The reasonableness of a restraint must be assessed at the time it was entered into, *not* the time it is sought to be enforced.[24] In relation to reasonableness, this Court has held that:[25]

> Reasonableness, in the relevant sense, relates to the legitimate interests of the parties to the covenant and to the wider public interest. … Reasonableness is to be considered in the context of the whole of the agreement between the parties and against the background of the circumstances in which the contract was entered into.

[45] In assessing the reasonableness of a restraint, its duration is plainly relevant. Of course, this is one only factor in the reasonableness analysis and the other terms of the restraint (including that it applies only to dealings and employment with customers from the last 12 months before termination) are also relevant.

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[23] *Gallagher* at [20].
[24] At [23].
[25] *Debtor Management (NZ) Ltd v Quail* [1993] 2 ERNZ 499 at 506-507.

[46] The defendant advanced an argument that a six month restraint was necessary to avoid the plaintiffs having a "springboard" advantage for unfair competition. It is, it was submitted, necessary to allow for a six month period in order to protect the proprietary interests of the defendant, to prevent the plaintiffs from approaching clients to exploit the relationships obtained during their time with the defendant. Ms Wallace's evidence is that a period of six months is necessary to allow a new consultant or manager to establish a relationship with clients before the departing employee competes for their business. She emphasises that relationships in the recruitment industry take time to establish. Her views as to the timeframes involved are said to be reinforced by previous experience within the industry.

[47] Mr McGinn submitted that the term of the restraining period and its reasonableness should be assessed in light of the plaintiffs' ability to leave immediately and compete fairly without soliciting customers.

[48] I accept that there is a distinction between a restraint of trade provision that prevents an employee from working in competition with the former employer at all and a provision which prevents an employee from soliciting or working with customers of the ex-employer. The scope of the former is wider, and more onerous. A full restraint of trade engages the public policy considerations identified by the Court in cases such as *Medic Corporation Ltd v Barrett*[26] more acutely than the latter.

[49] Mr Harrison relied on two cases in support of the submission that a six month restraint was excessive: *Enterprise Staff Consultants NZ Ltd v Durno*[27] and *Servilles Ltd v Whiting*.[28]

[50] *Durno*, like the present case, concerned a personnel consulting company. The defendant was subject to a six month restraint preventing her from interfering with, enticing or dealing with any persons who were customers or applicants or habitually dealt with the plaintiff. The Court considered that it was seriously arguable that a

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[26] [1992] 3 ERNZ 523 at 537.
[27] [1998] 3 ERNZ 547.
[28] AC 47/00, 2 June 2000.

three month restraint was reasonable but that a period beyond three months may not be considered reasonable. The Court found that, at the substantive hearing, a modification of the contractual restraint from six months to three months may be able to be achieved.[29] The Court issued an injunction for three months only in these circumstances.

[51] The case is arguably distinguishable from the present case. Apart from the different wording of the restraint at issue, the Court had particular regard to the fact that there was a three month guaranteed income provided to new employees[30] and that the plaintiff had previously accepted in other proceedings that three months was sufficient.[31]

[52] *Servilles Ltd* involved a hairdresser who had agreed to a six month restraint following termination of employment, not to solicit the plaintiff's customers nor to work within a five kilometre radius of his former salon. The Court accepted that the plaintiff had an arguable case as to the validity of the restraint but that a three month restraint was the maximum likely to be upheld at the substantive hearing. In doing so, the Court relied on its then recent survey of the length of restraints in *Walley v Gallagher Group Ltd*.[32] Both *Servilles* and *Gallagher* were decided before the Court of Appeal's judgment in *Fuel Espresso Ltd v Hsieh*.[33] There the Court emphasised the sanctity of contracts and the importance of enforcing reasonable restraints.[34]

[53] The restraint on contacting or working for customers in this case is also different from others in which such restraints have been held to be unreasonable. In *M A Watson Electrical Ltd v Kelling*[35] the High Court found that a restraint which prevented solicitation of customers or former customers of the plaintiff electrician firm was unreasonable given that the employer had been in business for almost 20 years and this meant that there were innumerable former customers. The Court

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[29] At 555.
[30] At 554.
[31] At 555.
[32] [1998] 3 ERNZ 1153 at 1187.
[33] [2007] ERNZ 60 (CA).
[34] At [21].
[35] [1993] 1 ERNZ 9.

noted that "the net was thrown too wide."[36] Similarly in *Pendergrast v Davies*,[37] the High Court found that a restraint preventing the employee carrying on business with customers of the employer over the three years before termination of employment for a further two years after termination "far exceed[ed] that which would be reasonable".[38] The Court declined to exercise its discretion to vary the restraint under the Illegal Contracts Act 1970 and held the restraint unenforceable.

[54] In *Beckett Investment Management Group Ltd v Hall*,[39] the English Court of Appeal considered a restraint which prohibited financial advisers from providing advice to any clients of their former employer for 12 months after termination. "Client" was defined in the employment agreement as including clients during the 12 months before the termination and broadly to include not only persons or companies with whom the former employees dealt but also, in an extended definition, any individuals acting on behalf of those persons or companies. The Court severed the extended definition but held that the remainder of the restraint was reasonable. In doing so, the Court relied on the seniority of the employees, the nature of the financial advice business, the industry standard of a 12 month restraint and the difficulty in recruiting and training replacement advisors.[40] The Court also noted generally the issues that arise where companies rely on employees to attract and maintain a client base, observing that:[41]

> If those employees who deal directly with clients leave the company and set up on their own account or go to work for a rival company, it is not unnatural that, one way or another, sooner or later, the clients will follow them. Although they have been the clients of the company rather than of its employees, from the clients' point of view it may well be the personal relationship with an individual adviser in which they have particular trust and confidence. *A tension therefore arises between the interest of the company in protecting its client base in the event that one or more of its employees depart and the interest of such employees who wish for the freedom to develop their careers elsewhere. The clients are not captive. In this situation, it is inevitable that employers include in contracts of employment clauses which seek to limit the ability of employees to take the client base with them.*

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[36] At 16.
[37] CP 685-SW01 HC Auckland, 1 August 2002.
[38] At [32].
[39] [2007] EWCA Civ 613, [2007] ICR 1539.
[40] At [29].
[41] At [1]. Emphasis added.

[55] Given the nature of the first and third plaintiffs' roles, the nature and relatively limited scope of the restraint itself, the characteristics of the recruitment industry generally, and the reasons said to underlie the term of the restraint, I consider that it is seriously arguable a term of six months is reasonable.

Geographical scope

[56] The restraint provisions in the first and third plaintiffs' agreements are not restricted in terms of geographical scope. While this issue was raised in the statement of claim as being relevant to the reasonableness or otherwise of the provisions, it was not strongly advanced by Mr Harrison at hearing.

[57] It appears that no geographical restriction was contained within the covenants as they only related to customers with whom the plaintiffs had had dealings within the previous 12 months. Some of those customers were national customers, some were not. It is the prior dealing that defines the scope of the restriction. In these circumstances, the absence of geographical limitations is explicable and hardly unreasonable.

[58] As Harman LJ observed in *G W Plowman & Son Ltd v Ash*:[42]

> ... it is said that [the non solicitation restraint] is not limited as to area, and that is quite true. But I have always thought that, when dealing with a solicitation covenant as opposed to a carrying on business covenant, area was not as a rule mentioned. It was said that if one of the customers moved to the other side of the country and the representative also moved to the other side of the country he still might not canvass him under this agreement, and I think that is right. But I do not see that that is any objection. It seems to me that the employer may well wish to preserve his connection even with a man who is 50 miles away or more.

Adequacy of consideration

[59] Counsel for the plaintiffs contended that the non-solicitation provision in the third plaintiff's agreement lacked consideration and was arguably unenforceable. Reliance was placed on the decision in *Watson Electrical Ltd*.

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[42] [1964] 1 WLR 568 (EWCA) at 572.

[60] As the Court of Appeal has made clear, a variation of an agreement requires consideration as much as an initial agreement: *Fuel Espresso*.[43] In that case, the Court upheld a restraint on the grounds that consideration was able to be implied at the commencement of employment with the employer. *Watson* was distinguished on that basis, the Court holding that:[44]

> … on the facts of that case, what was involved there was a subsequent variation to an employment agreement, and by reason of the particular facts of that case, at the point in time when it was sought to enforce the restraint of trade, there was no consideration. Hence this is just an illustration of the familiar point that a variation of an agreement requires consideration, just as much as the initial agreement does.

[61] Mr Harrison also referred to *Raukura Hauora o Tainui Trust v Arroll*[45] in support of an argument that extrinsic evidence of consideration is required where there is a variation of an agreement. However *Raukura Hauora* was decided before the Court of Appeal's judgment in *Fuel Espresso.* While *Fuel Espresso* involved an original, rather than a subsequent, contract the underlying principle remains the same, namely that consideration must be given and that the existence of consideration may be inferred from the contractual terms.[46] In the present case, Ms Carew's second agreement expressly records that: "the employee ... acknowledges that [she] has received consideration for these covenants by the salary and other benefits provided by the employer."

[62] In *Fuel Espresso* the Court of Appeal made it clear that the Court will not inquire into the adequacy or otherwise of the consideration, as long as some consideration is in fact given.[47] And even if that was a permissible inquiry for the Court, in the present case Ms Carew secured a company car (with an estimated annual value of $15,000) and a substantial increase in salary under her second agreement. While she cast doubt on whether this reflected any consideration for the restraint of trade provision, and her evidence was that the combined salary package was equivalent to other comparable positions, the defendant's evidence was that it

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[43] At [17].
[44] At [17].
[45] [2006] ERNZ 799.
[46] At [18].
[47] At [18].

plainly reflected consideration having been given (and accepted) in combination with cl 72 of her employment agreement.

[63] I do not consider that it is seriously arguable that the restraint is unenforceable for an absence of consideration.

Template agreement

[64] Mr Harrison observed that the non-solicitation provisions in Ms Pottinger's and Ms Carew's agreements were in identical, template terms. He suggested that this was relevant to assessing the extent to which they could be said to be reasonable. He submitted that for a restraint to be reasonable, it needs to be "tailor made" to the individual employee, and that it cannot be a generic or standard term.

[65] I do not accept that the mere fact that a non solicitation or restraint of trade provision is found, in identical terms, in a number of other employment agreements relating to different positions within an organisation and is not crafted in an individualised manner renders it unenforceable. The relevant inquiry is whether the restraint is reasonable, having regard to the proprietary interest it seeks to protect, in the context in which it was entered into. If it is, it matters not whether its genesis is a template provision found in numerous other agreements. The facts of each case will be pivotal.

Awareness of covenant

[66] Mr Harrison submitted that Ms Pottinger was unaware of the non-solicitation covenant in her employment agreement, despite having admittedly signed the agreement. Ms Randell is Business Services Manager at Kelly Services. Her evidence is that the first plaintiff had the agreement to consider, when it was delivered to her as an offer on 26 January 2010, until 10 February 2010. Ms Randell says that she would have followed her usual practice of running through the agreement heading by heading, including the non-solicitation section, and would have asked if Ms Pottinger had any questions. Ms Pottinger is a senior manager with a wealth of experience in the recruitment industry. The non-solicitation provision is not hidden in the agreement in small font, or buried in amongst other detailed provisions. Rather, it is referred to in the index and has its own heading.

[67] It is clear that the way in which a restraint has been agreed may be relevant to the reasonableness of the restraint, including where, for example, there is an imbalance of bargaining strength.[48] However, no such issues are raised in the context of the present case. There is no evidence to suggest that Ms Pottinger relied on the defendant to explain the agreement that she signed, and nor is any complaint advanced on her behalf of misrepresentation concerning the effect of the clause. She was a senior and experienced manager at the time of entering into the agreement. It appears from the evidence currently before the Court that she had ample time to consider the agreement and to take advice on it. It is notable that Ms Pottinger's letter of resignation refers to her contractual obligation to advise the company that she was going to work for a competitor organisation. And it is clear that she was involved in raising issues relating to restraints in respect of other departing employees. This suggests a level of awareness of the applicable restrictions.

[68] In any event, I do not consider that it is seriously arguable that the covenant is unenforceable simply because of Ms Pottinger's claimed failure to read the agreement she signed, and chose not to obtain advice in relation to it. In *Raukura Hauora*, the defendant's uncontested lack of awareness of a restraint of trade covenant at the time of signing the agreement was held not to affect the enforceability of the covenant.[49]

Who are the customers referred to in cl 69/71?

[69] The plaintiffs submit that the organisations which the defendant is seeking to prevent them from having dealings with exceed those which could reasonably be said to be customers with whom the defendant has a proprietary interest that could be undermined by the plaintiffs.

[70] The defendant submits that there is no doubt about the scope of the restraint, and that its wording is clear. It says that a customer list is readily accessible and that the customers the first and third plaintiffs had dealings with (for the purposes of the restraint clause) are identifiable, having regard to records of planned weekly visits by

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[48] *Fletcher Aluminium* at [42].
[49] At [16], although Courtney J did find that there had not been any adequate consideration at [18]. As noted, this judgment predates *Fuel Espresso*.

each of the plaintiffs over the 12 months prior to their departure. The schedule relied on by the defendant is annexed to an affidavit sworn by Kelly Services' Auckland Sales Manager, Mr Nutt.

[71] Mr Harrison submitted that the lack of certainty as to who is, and who is not, a customer is relevant to a determination of the current application. As he points out, the degree of dispute in relation to who is properly regarded as a customer places the plaintiffs in an invidious position as they are obliged to adopt a cautious approach, for fear of being accused of breach.

[72] The English Court of Appeal dealt with similar issues in *Plowman.* In declining to disturb a two year non-solicitation clause in the context of an interlocutory appeal, Davies LJ observed that an employee would not be found in breach of a non-solicitation restraint or an injunction if the breach was innocent and inadvertent.[50] And, as Russell LJ pointed out:[51]

> ... it is not difficult for the employee to comply with the covenant although he may not have knowledge of all of the people who were customers, because in this trade all he need do when calling upon anybody ... is to ascertain first whether he was a customer of the employer in the relevant period; and if [he] finds that he was such a customer, then he must say "goodbye," or whatever the appropriate form of words is in this trade in this part of the country.

[73] The scope of the non-solicitation clause in the present case is clear – it prevents the first and third plaintiffs from canvassing or soliciting any of Kelly Services' customers with whom they had had dealings within the 12 months prior to the termination of their employment, for a period of six months following termination of their employment.

[74] While it is regrettable that the parties have been unable to reach agreement on a list of customers (and it would appear to be in their interests to do so), I do not consider that it is seriously arguable that the non-solicitation provision itself is unenforceable for vagueness. As Mr McGinn pointed out, reasonableness is to be assessed at the time the agreement is entered into. No customer list existed at that stage, and nor could it. The wording of the provision is understandable in that

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[50] At 573-574.
[51] At 575. See too 574, per Davies LJ.

context. Clauses 69/71 are plainly directed at existing, rather than prospective, customers as Mr McGinn accepted. Issues relating to the application of cls 69/71 are properly coming back before the Authority for separate determination.

Conclusion: arguable case?

[75] I conclude that the defendant has established that it has a seriously arguable case that the restraint provisions in the first and third plaintiffs' employment agreements are reasonable and enforceable.

Balance of convenience

[76] The balance of convenience has often been described as the balance of the risk of doing an injustice. The Court is required to balance the potential injustice that will be caused to the plaintiffs if the injunction is granted against the potential injustice to the defendant if the injunction is not granted. In determining where the balance of convenience lies, the Court has regard to the relative hardships that may arise from a refusal of relief (but where it later emerges that the defendant's rights have been infringed) and the hardship arising from a grant of relief (where it later emerges that the plaintiffs were entitled to act in the way complained of).

[77] Factors that are relevant to an assessment of where the balance of convenience lies include the adequacy of damages for both parties, the relative strength of each party's case, and the conduct of the litigants. Also relevant is the position of the parties pending substantive determination of the claim. In this regard both Ms Pottinger and Ms Carew say that the ongoing restraint is impacting on their ability to look for opportunities and generate income.

[78] Ms Carew accepts that she has made contact with four customers of the defendant since leaving her employment with Kelly Services. The defendant became aware of one of these approaches when a customer (Mr McKinnon of JJ Richards and Sons Limited) reported that Mr McLeod and Ms Carew had rung him and Mr McLeod had enquired whether Nine Dot Consulting could manage the company's recruitment requirements. Ms Carew followed this telephone conversation up with an email (dated 21 March 2012) advising that:

> I'd like to come out with Janet Pottinger to discuss our idea?

[79] Ms Carew also emailed another customer, Bridon, on 20 March 2012, advising that:

> I'd like to come and see you and give you an update on what I'm doing now and what ninedot consulting is about.

[80] Ms Carew's evidence is that she was concerned to ensure that her sudden exit from Kelly Services was not misinterpreted by the customers she contacted, and to stem any damage to her reputation. Ms Pottinger says that she was unaware of any contact with Kelly Services' customers.

[81] Counsel for the defendant submitted that the apparent breaches of the non-solicitation provision by the third plaintiff are relevant, as interim relief is necessary to stop the exploitation of proprietary information continuing. Mr McGinn observed that the four examples that the third plaintiff had disclosed were likely to be the tip of the iceberg, and that the risk of on-going breach was relevant to an assessment of where the balance of convenience lay.

[82] I accept that it is arguable, based on the untested evidence before the Court, that Ms Carew may have breached the non-solicitation provisions in her agreement, and that there is evidence from which it can be inferred that Ms Pottinger may have aided and abetted a breach. These allegations are denied by the plaintiffs, and cannot be determined at this interim stage. Mr Harrison contends, and both plaintiffs affirm, that there has been no deliberate breach and that there will be no further contact with customers pending the Authority's determination. Mr McGinn makes the point that it is difficult to determine whether a breach has occurred, and that the fact that there is evidence of attempts to contact the defendant's clients by the third plaintiff (and after the defendant had filed its claim in the Authority) increases the risks that might otherwise arise.

[83] I accept that evidence relating to the way in which the plaintiffs may have acted since termination is relevant to an assessment of the balance of convenience, including as to the risk of breach pending substantive determination.

[84] The adequacy of damages is also relevant in assessing where the balance of convenience lies on an interim orders application. As Lord Diplock observed in *American Cyanamid Co Ltd v Ethicon Ltd*:[52]

> If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

And that:

> If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason to refuse an interlocutory injunction.

[85] The defendant submits that any harm to the defendant's business is not readily addressed by way of damages. While the plaintiffs submit that damages could be assessed by an account of profits from any business successfully solicited, I accept that such an approach does not account for client business lost following on from breaches not yet apparent at the substantive hearing and which may never come to light. I accept too that it would be difficult, if not impossible, to put the defendant back in the position it would have been in but for the breach, as any established benefit lost is the customer relationship, and ongoing future business.

[86] There is no evidence before the Court in relation to the financial position of the plaintiffs and whether they would be able to meet a damages award in the event that interim orders are declined, the matter proceeds to substantive determination, and the defendant succeeds against them. This suggests that an award of damages may not be an adequate alternative remedy. Conversely, the defendant has filed an undertaking as to damages. No issue is taken in relation to its sufficiency.

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[52] [1975] AC 396 at 408.

[87] I conclude that damages are unlikely to be an effective alternative remedy in the circumstances, and that this weighs in favour of the defendant in terms of an assessment of where the balance of convenience lies.

Overall interests of justice

[88] The third plaintiff took steps to contact customers of the defendant following termination of her employment, after she had taken up her position with the second plaintiff, and after Kelly Services had filed proceedings. Mr Harrison submits that the relevant time for considering any breach by the third plaintiff is at a substantive hearing. However, evidence that suggests that the third plaintiff may have breached the non-solicitation covenants in her agreement is relevant to a consideration of the overall interests of justice.

[89] Turning to the argument that the defendant breached s 103A in dismissing the plaintiffs and that this should favour the plaintiffs when considering the overall justice of the case, I note that any such assessment must be tentative at this stage. I accept, however, that at least with respect to procedural justification, the plaintiffs may have an arguable case that the defendant acted unlawfully. But, in terms of weighing the competing considerations, this must be balanced against the evidence of the plaintiffs' alleged breaches of the covenants.

[90] I accept Mr Harrison's submission that the position of the first and third plaintiffs is distinct, and that care ought to be taken not to blur consideration of the relevant factors in relation to each. This point is particularly apt in relation to the allegation of breach advanced against Ms Carew. It is, however, notable that the first plaintiff worked with Ms Carew during her time with Kelly Services, is sole director of Nine Dot Consulting, and that it was the company that employed Ms Carew within days of Ms Pottinger's departure. Ms Pottinger says that her husband was solely responsible for the decision to engage Ms Carew and that she knew nothing about it. However, Ms Pottinger is referred to in the letter sent to one of the clients by Ms Carew suggesting a joint meeting.

[91] Counsel for the plaintiffs submitted that there is a public interest in guarding against anti-competitive practices. Undoubtedly that is so. However, there is also a public interest in observing the sanctity of contract, the enforcement of otherwise

reasonable and rational agreements between contracting parties,[53] and the preservation of hard earned commercial property rights.

[92] I consider that the overall interests of justice weigh in favour of a grant of interim relief.

Result

[93] I conclude that it is seriously arguable that the restraint provisions in the first and third plaintiffs' individual employment agreements are reasonable and enforceable. I consider that the balance of convenience favours the defendant on an interim orders basis, particularly in terms of the extent to which any established breach might adequately be addressed by way of damages. I also consider that the interests of justice favour the continuation of the interim orders made by the Authority for the reasons given.

[94] The plaintiffs took issue with the scope of the Authority's orders. I have already dealt with the concerns identified by counsel for the plaintiffs. I consider that the terms of the restraints in each of the plaintiffs' employment agreements are plain on their face, and that there is a strong argument that they are reasonable to protect the defendant's proprietary interests. In these circumstances, I do not consider it necessary to modify the terms of the orders made in the Authority, and I decline to do so.

[95] The plaintiffs' challenge must fail and it is accordingly dismissed. An order is made in the same terms as the order in the Authority, as set out at paragraph 1 of this judgment, subject to one minor amendment relating to the applicable dates. The order is expressed to expire on 14 September 2012 for both plaintiffs. Six months from the date of Ms Carew's termination of employment is 14 September 2012, however Ms Pottinger's termination occurred on 12 March 2012. That means that the six month period expires, in relation to Ms Pottinger, on 12 September 2012.

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[53] *Credit Consultants Debt Services NZ Ltd v Wilson (No 3)* [2007] ERNZ 252 at [62], *Warmington v AFFCO New Zealand Ltd* [2012] NZEmpC 19 at [82].

Costs

[96] The defendant is entitled to costs. If costs cannot be agreed between the parties they may be the subject of an exchange of memoranda. Any memorandum filed on behalf of the defendant is to be filed and served within 30 days of the date of this judgment. Any reply is to be filed and served within a further 30 days.

Christina Inglis
Judge

Judgment signed at 4pm on 28 June 2012