

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 151
ARC 96/11**

IN THE MATTER OF an application for special leave to
remove proceedings

BETWEEN TRANSPACIFIC INDUSTRIES
GROUP (NZ) LIMITED
Plaintiff

AND KAINE HARRIS
First Defendant

AND SMART ENVIRONMENTAL
LIMITED
Second Defendant

ARC 37/12

AND IN THE MATTER OF proceedings removed from the
Employment Relations Authority

BETWEEN TRANSPACIFIC INDUSTRIES
GROUP (NZ) LIMITED
Plaintiff

AND STEPHEN GREEN
First Defendant

AND SMART ENVIRONMENTAL
LIMITED
Second Defendant

Hearing: 4 September 2012 (by telephone conference call)
(Heard at Auckland)

Appearances: Stephen Langton and Alex Chadwick, counsel for plaintiff
Richard Harrison, counsel for Kaine Harris and Smart Environmental
Limited
Stephen Green in person

Judgment: 4 September 2012

INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE G L COLGAN

[1] Having made interim confidentiality orders in the Court's last interlocutory judgment on 20 August 2012,¹ I left it to counsel and the parties to attempt to agree on a methodology for inspection of the documents attached to the affidavit of Dean Brown sworn on 15 August 2012. They have been unable to do so, at least in respect of the entitlement of the second defendant's Grahame Christian and the Court is now required to determine this narrow but important issue of confidentiality.

[2] The plaintiff puts its documents into three categories. These are, first, the documents attached to Mr Brown's affidavit between pp 35 and 79 and pp 212-214 which it accepts are not confidential and can be disclosed to the second defendant, Smart Environmental Limited, and Mr Christian. The second category of documents at pp 94-97 of Mr Brown's attached exhibits has confidential information redacted so that in this form the plaintiff accepts that these can be seen by Smart Environmental Limited and Mr Christian. There does not appear to be much, if any, difficulty with these first two categories.

[3] The third category of documents is one over which confidentiality is claimed and which cannot be effectively redacted. These are contained at pp 18-34 and pp 80-211 (except for pp 94-97) of the exhibits to Mr Brown's affidavit.

[4] As I alluded to in the first interlocutory judgment,² the preliminary issue in the proceedings for decision by the full Court next week is the lawfulness and reasonableness of cl 7.1 of the first defendants' individual employment agreements with the plaintiff judged at the time that these were entered into. The documents attached to Mr Brown's affidavit over which confidentiality is claimed are submitted to the Court to illustrate the sort of information that each of Messrs Harris and Green received and knew of in the course of their employment for the purpose of justifying cl 7.1.

¹ [2012] NZEmpC 141.

² At [5].

[5] The claims against Smart Environmental Limited are for penalties for being party to the breach by Messrs Harris and Green of their employment agreements and, in particular, cl 7.1. That is a separate issue from the one to be considered next week at a preliminary hearing and will depend upon a decision that cl 7.1 was both lawful and breached by Messrs Harris and Green. The question of the lawfulness of cl 7.1 will be heard next week and determined by the full Court. If the clause survives, whether it was breached and, if so, whether Smart Environmental Limited was a party to that breach, will be separate questions for subsequent consideration.

[6] I have not been persuaded by Mr Harrison, counsel for Smart Environmental Limited, that it is necessary or even appropriate for Mr Christian to be able to have access to these confidential documents at this point in the litigation to enable Smart Environmental Limited to properly prepare its defence. It may be that if cl 7.1 survives the judgment of the full Court, then the confidentiality argument will need to be had at that stage if, by then, the contents of these documents can still be said to be confidential given the passage of time since their creation and inevitable changes in the market.

[7] For these reasons, I uphold the plaintiffs' claims to the confidentiality from disclosure to Smart Environmental Limited and/or Mr Christian of the documents at pp 18-34 and pp 80-211 (except for pp 94-97 in redacted form) of the affidavit of Mr Brown.

[8] Several other interlocutory issues arose at the same time. First, any evidence for the plaintiff in reply to the defendants' evidence can be led viva voce at the hearing.

[9] Second, Mr Langton has signalled that there may be a challenge to the admissibility of some of the affidavit evidence filed by Mr Christian. This is a matter that should be dealt with before the start of the hearing before the full Court, in the first instance as between counsel and, if agreement cannot be reached, then at a further telephone directions conference before 12 September 2012.

[10] Mr Langton has signalled that it may not be until he makes his final submissions that he is able to identify any modification or modifications to cl 7.1 that the plaintiff may propose to the Court as a fall-back to its primary argument that the clause is valid as written. Mr Harrison for the defendants will, of course, have the same opportunity to advance a fall-back modification if his primary submission of complete illegality of cl 7.1 is not upheld. Mr Langton will present closing submissions first and if the defendants are prejudiced by these, they will have the opportunity of seeking to recall any witnesses to deal with matters of evidence affecting questions of modification that may not have been put to those witnesses earlier in the hearing.

[11] Finally, Mr Green, who is unrepresented and who does not propose to participate in the hearing, has nevertheless given an affidavit on which he has been called for cross-examination. Counsel are agreed that Mr Green will be present at court from 2.15 pm on the first day of hearing, 12 September 2012, and that efforts will be made to accommodate his cross-examination by Mr Langton and any re-examination within the period of two hours after 2.15 pm on that day.

[12] Leave is reserved for any party to make any further applications for directions or interlocutory orders on reasonable notice.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Tuesday 4 September 2012