

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 153
ARC 38/13**

IN THE MATTER OF Proceedings removed from the
Employment Relations Authority

BETWEEN AIR NEW ZEALAND LIMITED
Plaintiff

AND GRANT KERR
Defendant

Hearing: 31 July 2013, and 1, 2, 5 August 2013
(heard at Auckland)
and written submissions filed 6 and 8 August 2013

Appearances: Jennifer Mills and Christie Hall, counsel for the plaintiff
Peter Chemis and Jennifer Howes, counsel for the defendant

Judgment: 16 August 2013

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Introduction

[1] The principal relief sought by Air New Zealand Limited (Air New Zealand) in this proceeding against its former employee, Mr Grant Kerr, is an injunction enforcing a post-employment six-month non-competition restraint of trade clause contained in his employment agreement. In general, the legal position is that any such contractual restraint of trade provision is prima facie unlawful unless the employer can establish that it extends no further than is reasonably necessary in order to protect the employer's legitimate business interests. Air New Zealand maintains that such is the situation in the present case. It is a proposition strongly denied by Mr Kerr.

[2] The plaintiff filed a statement of problem along with an application for urgency with the Employment Relations Authority (the Authority) on 20 May 2013.

On 4 June 2013, the defendant made application to the Authority pursuant to s 178 of the Employment Relations Act 2000 (the Act) for removal of the matter to this Court on the grounds that one or more important questions of law were likely to arise out of this other than incidentally. The questions of law were identified as:

- (a) whether a period of garden leave (involving the employee's complete removal from the relevant industry and his or her workplace) is in essence a restraint of trade; and
- (b) how and to what extent a period of garden leave should be taken into account when assessing the reasonableness of a post-employment restraint of trade.

[3] The Authority dealt with the application for removal (which was opposed by the plaintiff) with urgency on the papers and on 10 June 2013 issued a determination¹ granting the application for removal. The Authority determination recorded that the parties had earlier attended (unsuccessfully) mediation. The plaintiff then made application to this Court pursuant to s 178(5) of the Act alleging that the Authority had removed the proceeding to the Court improperly. After an urgent hearing by way of telephone conference call, Chief Judge Colgan issued an interlocutory judgment² on 21 June 2013 dismissing the application and awarding costs to the defendant. The hearing of the substantive proceedings was allocated a fixture date for 31 July 2013.

[4] Other interlocutory issues arose in the period leading up to the hearing. On 25 June 2013, an interlocutory judgment³ was issued relating to the handling of confidential documents. On 9 July 2013, a further interlocutory judgment⁴ was issued in response to a joint application filed by the parties seeking an order under s 219(1) validating certain informal steps taken to satisfy the requirements of s 164(a) - (c) of the Act. That judgment also referred to unresolved matters relating to disclosure and fixed a telephone directions conference for 11 July 2013 to deal with them. Then, virtually on the eve of the hearing, another issue arose in relation to disclosure which was explained in a further interlocutory judgment⁵ dated

¹ [2013] NZERA Auckland 241.

² [2013] NZEmpC 114.

³ [2013] NZEmpC 116.

⁴ [2013] NZEmpC 126.

⁵ [2013] NZEmpC 142.

29 July 2013. I will need to come back to this last-minute disclosure development because it assumed some significance as the hearing progressed.

The facts

[5] Air New Zealand is a large public company with its head office in Auckland, carrying on business as a domestic and international airline. It has approximately 11,000 employees. The company also has three wholly owned subsidiary companies which carry on business as operators of air transport services providing both domestic passenger and cargo transport services. They are Air Nelson Limited (Air Nelson) which is based in Nelson; Mount Cook Airline Limited (Mount Cook) based in Christchurch; and Eagle Airways Limited (Eagle) based in Hamilton.

[6] Before joining Air New Zealand, Mr Kerr had spent 23 years in the electricity distribution sector in both New Zealand and Australia with a company called Energex Limited (Energex). The Court was told that Energex was owned by the Queensland government and it operated the electricity network in that state. Mr Kerr was one of three Energex employees who, in 1999, extended the business into New Zealand. The three individuals expanded the business in New Zealand and at the time Mr Kerr left to join Air New Zealand in 2004, Energex had just over 250 staff.

[7] Towards the end of 2004, Mr Kerr was approached by an executive search company on behalf of Air New Zealand and asked whether he would be interested in the role of International Cargo Operations Manager, based in Auckland. Mr Kerr ended up accepting that position. Then in October 2007 he was appointed General Manager of Eagle Airways based in Hamilton. His employment agreement with Eagle Airways contained a three-month notice provision along with a three-month restraint of trade clause.

[8] In May 2009, Mr Kerr was offered a new position as General Manager of Air Nelson. Air Nelson is the largest of the three regional airlines. Mr Kerr accepted the position and moved to Nelson taking up his new role in July 2009. In consideration of an increase in salary and benefits Mr Kerr entered into a new individual employment agreement (the employment agreement) which increased his notice

period and restraint period respectively from three to six months. The following express provisions in the employment agreement formed the basis of the pleadings and I set them out in full:

3.2 Confidentiality

You shall not at any time or for any reason, whether during the term of this agreement or after its termination, use or disclose to any person any confidential information of the Company except as may be reasonably necessary to enable you to fulfil your obligations under this agreement. This clause shall not apply to information that has entered the public domain other than through yourself. Confidential information means information obtained during the course of your employment about the Company or related companies, or which in any way relates to the business of the Company or related companies, which is not available to the public at large.

...

4.2 Employee Termination

You may terminate your employment at any time by giving six (6) months' written notice to Air New Zealand, or a lesser period by agreement with the Chief Executive Officer.

...

4.5 Payment in Lieu of Notice/Alternative Duties

If you give notice of termination of your employment, or if Air New Zealand gives you notice of termination under clause 4.3, Air New Zealand may, at its sole discretion:

- (a) pay your Total Fixed Remuneration to you in lieu of some or all of any period of notice; or
- (b) place you on "garden leave" for some or all of the notice period; or
- (c) direct you during some or all of your notice period to perform such alternate duties as Air New Zealand may reasonably require having regard to the best interests of Air New Zealand and its business (and you acknowledge that such alternate duties may be less in status and responsibility than your duties and responsibilities prior to notice being given).

...

5. NON-COMPETITION AFTER EMPLOYMENT

In consideration of entering into this agreement, including the resultant benefits to you, you agree that for six (6) months after termination of your employment (regardless of the reason it was

terminated), you will not do any of the following without the written consent of the Chief Executive:

- (a) be directly or indirectly involved in any capacity whether as an employee, contractor, principal, agent, shareholder, self employed person or otherwise, in any business or activity which was in any way in competition with the Company or its related Companies at the time your employment terminated, or enters into competition with the Company or its related Companies in the six (6) months following the date of termination. This applies anywhere in Australia or New Zealand. However, you are not prevented from holding shares listed on a recognised stock exchange as long as you do not hold more than 10% of the issued capital of any company;
- (b) attempt to entice away from the Company or its related companies any client or supplier of the Company or its related companies;
- (c) employ or attempt to entice away any employee or contractor of the Company or its related companies;
- (d) assist anyone to do any of the acts in (b) or (c).

You also acknowledge that upon termination of your employment for whatever reason, the Company may seek a further restraint which will be for consideration. Any such restraint will be by agreement with you.

[9] On 4 February 2013, Mr Kerr gave notice of his resignation informing Air New Zealand that he had accepted employment with Jetstar Airways Limited (Jetstar) in the position of Head of New Zealand and that he intended to commence employment with Jetstar on 5 August 2013. Air New Zealand described Jetstar as its only real competitor in the New Zealand domestic market. There was no dispute that the relationship between the two companies could fairly be described as “aggressively competitive”.

[10] Mr Kerr outlined to the Court in evidence the events leading up to his resignation. He said that he had very much enjoyed his eight and a half years with Air New Zealand which he described as “a fantastic company with many very good and talented people.” He said that in mid-December 2012 he was approached by an executive search company who were looking for someone to take up a role at Jetstar. After two discussions with the search company and one telephone discussion with a Jetstar representative Mr Kerr decided that the role they were trying to fill was not for him and he advised the search company to that effect.

[11] On 21 December 2012, Mr Kerr commenced his annual leave and on 29 December 2012, while still on leave, he was contacted again by the executive search company. The nature of the role they were looking to fill had changed and while Mr Kerr was becoming more interested in what Jetstar was proposing, by 17 January 2013 when he returned to work he had still not received any firm offer.

[12] Mr Kerr said that he received an offer from Jetstar on Friday, 1 February 2013 which he decided over that weekend to accept. They did not agree on a commencement date but rather decided to reassess the start date once Air New Zealand's position on notice and the restraint became clear. Jetstar told Mr Kerr that they wanted to release a press statement about his appointment. On Monday, 4 February 2013, Mr Kerr flew to Auckland and advised his immediate manager, Mr Bruce Parton, of his resignation and he also told Mr Parton that Jetstar was proposing to issue a press release the following day. Mr Parton told Mr Kerr that the options were that he would be put on projects or on garden leave, and that garden leave was more likely. On his way to the airport that evening for his return flight to Nelson Mr Kerr received a text message from Mr Parton confirming that he might be put on garden leave.

[13] On 5 February 2013, Mr Kerr received a visit at his home from the Air Nelson HR Manager, Mr Carter, who had packed and brought with him Mr Kerr's personal belongings. Mr Carter asked Mr Kerr for his keys and other office items and told him that he was on garden leave from that point.

[14] Mr Kerr agreed that he would remain on garden leave for the six-month period up to 4 August 2013. He also agreed to abide by the confidentiality provisions in cl 3.2 and the non-solicitation restrictive covenants in cls 5(b), (c) and (d) of the employment agreement as well as his common law obligations of confidentiality and his duty of fidelity. He advised Air New Zealand, however, that he did not intend to comply with the six-month post-termination non-competition restrictive covenant at cl 5(a) of the employment agreement because he had received legal advice that it was unenforceable. The restrictive covenant was to take effect from 5 August 2013, the final day of the hearing in this case, hence the urgency which has been a hallmark of this proceeding throughout.

[15] In summary, therefore, as counsel for Air New Zealand, Ms Mills expressed it in her opening submissions:

Accordingly, the issue at the heart of this proceeding is the reasonableness and enforceability of the non-competition restraint of trade at clause 5(a) of the Employment Agreement (**non-competition restrictive covenant**), and not the remaining obligations in clauses 5(b) to 5(d).

[16] Mr Kerr told the Court that if the non-competition restraint of trade provision is enforced he will not be in receipt of any income for the next six months and the financial impact on him will be “significant”. He said that he has a mortgage and he would need to dispose of assets “very quickly”.

The pleadings

[17] Relevantly, Air New Zealand alleged in its statement of claim:

8. During the defendant’s employment with the plaintiff, the defendant was privy to and accessed confidential information belonging to the plaintiff, including:

- (a) pricing structures;
- (b) costs;
- (c) route profitability;
- (d) short, medium and long-term strategy, including marketing initiatives and proposed changes to routes, timetabling and pricing;
- (e) strategic intelligence, including strategic intelligence specifically related to Jetstar Airways Limited.

...

14. The actions of the defendant are or will be in breach of the Employment Agreement.

Particulars

- (a) The defendant has notified the plaintiff that he intends to breach clause 5(a) of the Employment Agreement by commencing employment with Jetstar on or around 5 August 2013.
- (b) The defendant has breached the implied term of fidelity contained in the Employment Agreement by:

- (i) notifying the plaintiff, while still in employment, that he does not intend to comply with a fundamental term of the Employment Agreement;
 - (ii) publicising his appointment with Jetstar while still an employee of the plaintiff; and
 - (iii) allowing Jetstar to provide confidential commercial information to him, thereby creating a conflict of interest.
- (c) If the defendant commences employment with Jetstar in breach of clause 5(a) of the Employment Agreement, there is a significant risk that the defendant will (whether knowingly or inadvertently) breach confidentiality obligations set out in clause 3.2 of the Employment Agreement.

[18] In relation to these particular allegations, Mr Kerr in his statement of defence responded:

8. He says that in his employment with the plaintiff he has had access to various confidential information about some aspects of Air New Zealand's business, and many aspects of the business of its wholly owned subsidiary, Air Nelson. The defendant otherwise denies the allegations in paragraph 8 of the statement of claim.

[19] Mr Kerr also denied the allegations contained in paragraph 14 of the statement of claim and he then went on to raise an affirmative defence in the following terms:

15. In their employment agreement the parties agreed to a post employment restraint to prevent competition. A restraint of this nature is unlawful and unenforceable and cannot be modified to provide a party with more than it bargained for.
16. In the alternative, and in the event that the Court can, as a matter of law, modify the restraint, there is no sufficient proprietary interest to support the restraint or to require its enforcement.
17. Even if the Court can, as a matter of law, modify the restraint, and even if there is a sufficient proprietary interest to support the restraint, it is unreasonable because the defendant has, in effect, already been restrained for a period of six months.

The law

[20] Perhaps an appropriate starting point in any consideration of the legal authorities relating to restrictive covenants is the observation made by McDougall J in *Stacks/Taree Pty Ltd v Marshall (No 2)*:⁶

There can of course be a problem with excessive reliance on decided cases. The question of validity of a covenant in restraint of trade ... is not really a question of law. Decided cases state the relevant principles, and may provide useful, indeed valuable, guidance as to their application in particular factual circumstances. But the validity of a covenant in restraint of trade is to be assessed having regard to the terms of the particular covenant and the facts of the particular case.

[21] The legal position in New Zealand in relation to restraint covenants was considered recently by the full Court in *Transpacific Industries Group (NZ) Ltd v Harris*.⁷ The Court stated:

[37] Despite what one might think from reviewing recent cases in this and similar jurisdictions that the presumption of voidness of restraint covenants has slipped out of favour with courts, that is still the position, at least in New Zealand employment law. The most recent and most authoritative statements on the issue are contained in cases such as *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 and *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731, [2001] ERNZ 46 (CA).

[38] In *Gallagher Group* the Court of Appeal re-stated this proposition as follows:

... Covenants 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 former employer and in the public interest: *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724, 733.

[39] In *Fletcher Aluminium* the Court of Appeal did not disagree with the approach used by this Court when at [15], the Court of Appeal noted:

The Judge then referred to the law. He noted that it was common ground that the restraint was unenforceable unless the company established its reasonableness from the point of view of the employer, the employee, and the general public. He noted that reasonableness must be determined at the time the covenant was entered into, and referred to the recent decision of this Court in *Gallagher Group Ltd v Walley* ... He referred to the need to consider what the parties might reasonably have foreseen at the time of entering into the contract. No issue is taken with that approach.

⁶ [2010] NSWSC 77 at [54].

⁷ [2013] NZEmpC 97.

[22] The full Court also considered a number of other authorities which were referred to by counsel in the present case including the decision of the English Court of Appeal in *Littlewoods Organisation Ltd v Harris*⁸ and the English High Court judgment in *Faccenda Chicken Ltd v Fowler*⁹ where Goulding J (at first instance) defined three different classes of confidential information. I will need to return to the full Court judgment in *Transpacific Industries* because it figured prominently in counsel's submissions on one particular aspect of the present case.

[23] The approach to restraint covenants is for the Court to determine what the clause means when properly construed and then to consider whether the employer or former employer has established a legitimate proprietary interest requiring protection. Legitimate proprietary interests have been held to include the protection of customer connections, confidential information and the integrity or stability of the workforce. In the present case the proprietary interest claimed is the protection of confidential information. If such an interest is established, then the issue arises as to whether the restraint provision is shown to be no wider than is reasonably necessary. That in turn requires a consideration of the reasonableness of the period of the restraint, its scope and its geographical limits.

[24] The reasonableness of the restraint must be established by the party who seeks to enforce the provision; it is then up to the party resisting enforcement to establish that the restraint is contrary to the public interest.¹⁰ If the Court is satisfied as to these matters then, in the exercise of its discretion, it will need to decide whether or not to grant injunctive relief, either interlocutory or permanent as the case may be. I put to one side at this point the issue of the Court's power under s 8 of the Illegal Contracts Act 1970 to delete or modify a restraint covenant which was a matter considered in some detail in the *Transpacific Industries* case.

The restraint covenant

[25] There was no dispute that in the construction of a restraint covenant the same principles of interpretation are to be applied as in the construction of any other contractual term. Those principles were identified by Lord Hoffmann in *Investors*

⁸ [1978] 1 All ER 1026 (CA).

⁹ [1985] 1 All ER 724 (QB).

¹⁰ Edwin Peel *Trietel: The Law of Contract* (12th ed, Sweet & Maxwell, London, 2007) at [11-079].

Compensation Scheme Ltd v West Bromwich Building Society,¹¹ and affirmed by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.¹² The first of Lord Hoffmann's principles was stated in these terms:

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[26] The principal submission advanced by counsel for the defendant, Mr Chemis, was that the meaning of the restraint provision, cl 5(a), was clear and unambiguous and on their plain and ordinary meaning the words used restrained competition only. Mr Chemis submitted that on their face the words leave no room for any claim to protect a legitimate proprietary interest and the restraint provision was, therefore, void and unenforceable. In terms of the Court's modification powers under the Illegal Contracts Act 1970, Mr Chemis submitted that a complete rewrite of cl 5(a) would be necessary to make it lawful and enforceable and there was no basis upon which the Court could make such modifications.

[27] In support of his submissions on this particular issue, Mr Chemis sought to rely on both the interlocutory judgment - *Green v Transpacific Industries Group (NZ) Ltd*,¹³ and the full Court decision in the *Transpacific Industries* case.¹⁴ The restraint covenant in *Transpacific* read as follows:¹⁵

7. COVENANT NOT TO COMPETE

7.1 You acknowledge that the services that you are to perform for us may be of a special, unique, unusual, extraordinary and intellectual character. You appreciate that we may suffer serious injury if you took the knowledge and skills acquired during your employment with us and applied them for the benefit of a competitor of ours. Accordingly, you agree that you shall not work for a Competitor either directly or indirectly for that period of time (plus any notice period not worked out), and in that area, as set out in Schedule C after the termination of this Employment Agreement.

The period of this restraint in Schedule C was three months and the relevant area was the North Island of New Zealand.

¹¹ [1998] 1 WLR 896 (HL) at 912-913.

¹² [2010] NZSC 5, [2010] 2 NZLR 444 at [61].

¹³ [2011] NZEmpC 6.

¹⁴ [2013] NZEmpC 97.

¹⁵ At [4].

[28] Mr Chemis submitted that the injunction was declined at the interlocutory stage because of concerns over the prohibition on competition in the covenant and in its substantive judgment the full Court, “found in the words something to latch onto that supported a legitimate proprietary interest (i.e. the word knowledge). The Court said that this was wide enough to cover knowledge owned by the employee, but also knowledge that was equivalent to a trade secret.” In counsel’s words:

45. In the present case there is nothing within the contemplation of the parties for the Court to work with because they intended only to restrict competition. There is no reference to confidential information in the nature of trade secrets.

[29] In response to the submissions advanced by Mr Chemis on this issue, counsel for Air New Zealand accepted that the wording of cl 5(a) was clear and unambiguous and it meant that for a period of six months following termination of his employment, Mr Kerr would refrain from being involved in a business or activity that was in competition with Air New Zealand or its related companies. Ms Hall, who presented the plaintiff’s submissions on this particular issue, acknowledged that if the intention of the restraint was to prevent competition *per se* then it would be unlawful but counsel submitted that the obvious intention of the clause was to protect Air New Zealand’s legitimate proprietary interests, in this case its confidential information.

[30] I prefer Air New Zealand’s submissions on this issue. Although there is no question that a restraint covenant to prevent competition *per se* is unlawful, it seems to me that at least since the decision of the English Court of Appeal in *Littlewoods*, the courts have accepted that a non-competition restraint covenant can appropriately be relied upon and enforced in order to protect certain subject matters such as an employer’s legitimate proprietary interests. It is up to the employer or former employer, however, to satisfy the Court of the existence of a proprietary interest justifying such protection and unless that threshold is met, then the restraint covenant remains unlawful and unenforceable.

[31] In *Littlewoods*, in a passage cited in the full Court judgment in *Transpacific Industries*, Lord Denning stated:¹⁶

¹⁶ At 1033.

It is thus established that an employer can stipulate for the protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.

[32] In *Corporate Express Ltd v Day*,¹⁷ Brown J, adopting the judgment of Mummery LJ in *FSS Travel and Leisure Systems Ltd v Johnson*,¹⁸ identified various legal provisions in relation to covenants restricting a former employee's activities, stating:

37. ...

- (i) The court will never uphold a covenant taken by an employer merely to protect himself from competition by a former employee.
- (ii) There must be some subject matter which an employer can legitimately protect by a restrictive covenant.
- (iii) Protection can be legitimately claimed for identifiable objective knowledge constituting the employer's trade secrets with which the employee has become acquainted during his employment.
- (iv) Protection cannot be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by an employee as part of his job during his employment even though that will equip him as a competitor or potential employee of a competitor of the employer.
- (v) The critical question is whether the employer has trade secrets which can be fairly regarded as his property as distinct from the skill, experience and know-how and general knowledge which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the services of a competitor.

38. It is clear from authority (see *Littlewoods Organisation v Harris* [1977] 1 WLR 1472 and *Lansing Linde v Kerr* already referred to) that trade secrets and confidential information are different ways of describing the same kind of material.

¹⁷ [2004] EWHC 2943 (QB).

¹⁸ [1998] IRLR 382 (CA) at 385.

[33] J D Heydon in *The Restraint of Trade Doctrine* observes that:¹⁹

These difficulties of remedy can be overcome by a covenant not to compete drafted to prevent work in a certain area, or in a certain trade, or for a certain firm. Such covenants act as blankets: they go further than the interests protected by general law, but this is permitted so that these interests are more effectively protected.

[34] On my analysis, the principal difficulty in the *Transpacific Industries* case was that the restrictive covenant in question did not take the form of what might be called a traditional non-competition clause but it sought, amongst other things, to restrain the employees from using knowledge and skills acquired during their employment. As a matter of law, knowledge and skills acquired during employment cannot generally be prohibited from being exercised by a former employee. In other words, even had the employer been able to establish a legitimate proprietary interest to protect, the restraint of trade clause went much further than would otherwise have been permitted. Hence, the full Court spent considerable time considering whether it should modify the clause under s 8 of the Illegal Contracts Act 1970, concluding in the end that, as the parties had not complied with the provisions of s 164 of the Act relating to mediation, it was inappropriate to order modification.

[35] One of the other submissions advanced by counsel for Air New Zealand in relation to this particular issue was that on Mr Kerr's contended interpretation of the restraint provision, "Air New Zealand has astoundingly elected to enter into a restraint that would, based on clear and long established legal principles, be unenforceable, as compared with what both parties must, very realistically, have foreseen; being that the restrictive covenant is intended to protect Air New Zealand's legitimate proprietary interests."

[36] I accept that the Court should be reluctant to conclude that a contractual provision is unlawful unless it is left with no alternative. In *TFS Derivatives Ltd v Morgan*,²⁰ Justice Cox expressed the principle in these terms:

... if, having examined the restrictive covenant in the context of the relevant factual matrix, the court concludes that there is an element of ambiguity and that there are two possible constructions of the covenant, one of which

¹⁹ JD Heydon *The Restraint of Trade Doctrine* (3rd ed, LexisNexis Butterworths, Chatswood (NSW), 2008) at 112.

²⁰ [2004] EWHC 3181 (QB) at [43].

would lead to a conclusion that it was in unreasonable restraint of trade and unlawful, but the other would lead to the opposite result, then the court should adopt the latter construction on the basis that the parties are to be deemed to have intended their bargain to be lawful and not to offend against the public interest.

[37] Confidential information was specifically highlighted in the employment agreement in the present case and Mr Kerr accepted in his pleadings that he had access to confidential information from time to time about various aspects of Air New Zealand's business, particularly the business of Air Nelson. Given his background, I am satisfied that Mr Kerr would have been keenly aware that Air New Zealand claimed to have a proprietary right to protect such information and that that was the intention of the restraint provision in question rather than to protect competition *per se*.

[38] I turn now to consider whether Air New Zealand is legitimately entitled to claim protection in respect of the confidential information identified in the present case.

Confidential information

[39] Both parties were in agreement that the three categories of information identified in *Faccenda Chicken* remains the starting point in assessing whether information is confidential. That case was also considered in some detail by the full Court in *Transpacific Industries*. In *Faccenda Chicken*, Goulding J (at first instance) categorised confidential information acquired by an employee as falling into three classes:²¹

First there is information which because of its trivial character or its easy accessibility from public sources of information cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master's competitor. ...

Second, there is information which the servant must treat as confidential, (either because he is expressly told it is confidential, or because from its character it obviously is so), but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service,

²¹ [1985] 1 All ER 724 (QB) at 731-732.

the law allows him to use his skill and knowledge for his own benefit in competition with his former master ... If an employer wants to protect information of this kind, he can do so by an express stipulation restraining the servant from competing with him (within reasonable limits of time and space) after the termination of his employment. ...

Third, however, there are to my mind specific trade secrets so confidential that even though they may necessarily have been learned by heart and even though the servant may have left the service they cannot lawfully be used for anyone's benefit but the master's. ...

[40] In the Court of Appeal,²² Neill L J disagreed with the passage in Goulding J's judgment where he suggested, in relation to the second category of information, that it could be protected by a restraint of trade covenant holding that a restrictive covenant will not be enforced unless the protection sought is reasonably necessary to protect a trade secret or its equivalent.²³

[41] Mr Chemis submitted that, based on the Court of Appeal's conclusion in *Faccenda Chicken*, Air New Zealand would have to establish that the information it seeks to protect is concerned about either a trade secret or its equivalent. Mr Chemis went on to submit:

62. The case for Mr Kerr is that the broad range of knowledge he has is merely part of his knowledge and skills and falls within the second category in the *Faccenda Chicken* case. He says that none of the information falls within the third category, i.e. information that amounts to a trade secret or equivalent.

[42] The conclusions of the Court of Appeal in *Faccenda Chicken* in relation to the second category of information identified by Goulding J has come in for considerable criticism in Australia. In the New South Wales Court of Appeal decision in *Del Casale v Artedomus (Aust) Pty Ltd*,²⁴ Campbell J A devoted a large part of his judgment to analysing, under the heading, "Why *Faccenda* at 137 is Wrong", why Neill LJ fell into error.²⁵ The Court in *Del Casale*, after referring to other Australian authorities, confirmed that, contrary to the English Court of Appeal's conclusions in *Faccenda Chicken*, an employer can protect the use of information in the second category identified by Goulding J by means of a restrictive covenant.

²² [1987] Ch 117 (CA).

²³ At 137.

²⁴ [2007] NSWCA 172.

²⁵ At [39].

[43] In his judgment in *Del Casale* Hodgson JA noted that the second category of confidential information in *Faccenda Chicken* is often called “know-how”. His Honour opined that it may be sufficient for information to be confidential if it is “not freely available, particularly if it is not freely available to competitors of the employer”. Hodgson JA referred to the considerations listed by Kirby P in *Wright v Gasweld Pty Ltd*,²⁶ and set out the 12 factors listed by Robert Dean, *The Law of Trade Secrets and Personal Secrets*,²⁷ that helped in determining whether information may be considered confidential.

[44] In New Zealand it would appear from the authorities that in appropriate cases the courts are prepared to extend protection through a restrictive covenant to confidential information encompassed more within the second category of information in *Faccenda Chicken* rather than the third. In *Broadcasting Corporation of New Zealand v Nielsen*,²⁸ Hardie Boys J observed:²⁹

The expression ‘trade secrets’ is not to be understood *stricto sensu* (sic). In *Herbert Morris Ltd v Saxelby*, Lord Parker of Waddington referred to ‘information confidentially obtained’ ...

[45] In *Nielsen* it was held, in the context of an employee joining a rival radio station, that information about his former employer’s salaries, budgets, promotions and attitudinal surveys could all be classified as confidential. Of particular relevance to the authorities referred to in the previous section of this judgment, under the heading “The restraint covenant”, Hardie Boys J stated:³⁰

I have throughout the case been troubled by the quite remarkable weakness of the covenant. It does not prevent Mr Nielsen working for a competitor. It merely limits the duties he may perform.

[46] In *Skids Programme Management Ltd v McNeill*,³¹ the Court of Appeal was concerned with a restraint of trade provision in a franchise agreement. The Court noted that, “in some respects the franchise situation may be more akin to that of an employment contract than to that of a vendor by purchaser contract.”³² Although

²⁶ (1991) 22 NSWLR 317 at [40].

²⁷ (2002) 2nd Ed., at 190.

²⁸ (1988) 2 NZELC 96,040.

²⁹ At 96,049.

³⁰ At 96,052.

³¹ [2012] NZCA 314, [2013] 1 NZLR 1.

³² At [50].

that was a breach of confidence case, the Court observed that it was “not necessary for there to have been the misuse of a trade secret for the information to have the requisite quality of confidence.”³³

[47] In this Court, a similar approach has been followed. The full Court in *Transpacific Industries* referred to *Television New Zealand v Bradley*;³⁴ *Allright v Canon New Zealand Ltd*³⁵ and *Warmington v AFFCO New Zealand Ltd*,³⁶ where restrictive covenants were upheld. The confidential information in the respective cases were described as: “confidential information pertaining to advertising, future programming schedules and volume incentive discount agreements”; “detailed knowledge of strategic and financial affairs” and “commercially sensitive information which would not normally be available to a competitor.”

[48] In *Transpacific Industries* itself, the full Court considered that information about strategy could be confidential, especially when the strategy is in its developmental stages, because if competitors became aware of the strategies, it could put the former employer at a considerable disadvantage. The Court made this observation while at the same time expressing reservations as to whether all the strategies in question fell within the third category of confidential information identified in *Faccenda*. In particular, the Court expressed reservations as to whether information about the employer’s pricing lists and information relating to its customers could be categorised as the equivalent of a trade secret.

[49] The confidential information sought to be protected in the present case by Air New Zealand is described in the pleadings as set out in [17] above. In her closing submissions, counsel for Air New Zealand referred to the following documentation as constituting confidential information warranting protection:

- (a) Monthly flyers
- (b) Monthly Management Packs
- (c) Monthly Balanced Australasia Scorecards
- (d) Shorthaul Airlines Up-dates

³³ At [79].

³⁴ EMC Auckland AEC 14/95, 10 March 1995.

³⁵ (2008) 6 NZELR 367.

³⁶ [2012] NZEmpC 19.

- (e) Specific information on marketing initiatives
- (f) Other email updates.

[50] Counsel also submitted that Mr Kerr received additional confidential information through telephone conference calls and regular meetings described as:

- (a) Friday calls
- (b) Tuesday calls
- (c) Monthly DR meetings
- (d) Monthly revenue management meetings
- (e) Strategy sessions

[51] It was also alleged that Mr Kerr was privy to confidential information in respect of:

- (a) The Starfish campaign
- (b) The Nightrider campaign
- (c) The Grabaseat campaign

[52] Other “confidential information” listed by counsel was described as:

- (a) The McKinsey project
- (b) Information regarding competitive strategy
- (c) Information regarding hedging
- (d) Secret formulae

[53] In response, Mr Chemis referred to the “large body of documentation containing detailed and mostly financial information” which had been produced to the Court by Air New Zealand on a confidential basis. He correctly made the point that it was difficult to relate many of the documents referred to in submissions to the confidential information detailed in the pleadings.

[54] The thrust of Mr Chemis’ submissions on this issue, however, was that as General Manager of Air Nelson, which counsel described as “a substantial organisation with over 500 staff that operates 23 aircraft which undertake 1200

flights per week”, Mr Kerr was fully focused on that role rather than Air New Zealand’s wider business. Mr Chemis described Air New Zealand documentation detailed in the previous paragraphs as “significant, dense and detailed” and made the point that even had he focused on it, Mr Kerr is only likely to have been able to recall some things and, even then, probably generally.

[55] In the *Transpacific Industries* case the Court deliberately did not canvass the allegedly confidential material for the reason that it could defeat the suppression order. For the same reason, I do not intend to canvass the confidential documentation in the present case. It was produced by Air New Zealand on strict conditions as to confidentiality and those conditions were confirmed by the Court in an interlocutory order. Suffice it to say, however, that whilst I empathise with many of the points made by Mr Chemis, I do consider that Air New Zealand has established that it has a legitimate interest in protecting itself from the misuse of the confidential information encompassed in the documentation identified in the statement of claim.

[56] However, I would add two observations at this point. First, without going into the evidence which touched upon confidential matters, I do not accept that there is any substance in the allegation that Air New Zealand had a “secret formula” (whatever is meant by that term) which Mr Kerr was aware of (see [52] above). Secondly, I record that contrary to Air New Zealand’s obvious suspicions, there was absolutely no evidence that Mr Kerr had taken a copy of any of the alleged confidential documentation or transferred any such documentation or information to his home computer or anywhere else. Air New Zealand carried out a thorough search of its backup system specifically in relation to Mr Kerr’s work computer. It also retained, with the consent and approval of Mr Kerr and his counsel, an independent expert forensic technology firm to attend Mr Kerr’s home and inspect and create a clone of the hard drives of his two personal computers. The expert’s report was produced in evidence. It revealed nothing untoward.

Reasonableness of the restraint

[57] Mr Kerr claims that the restraint is unreasonable in terms of its duration (six months); geographical area (i.e. New Zealand and Australia) and its scope

(restraining him being in any way involved “in any business or activity which was in any way in competition with the Company”). In considering the duration of the restraint, Mr Chemis submitted that the Court needed to take full account of the six months’ garden leave Mr Kerr has already taken which counsel submitted was a restraint of trade in itself governed by the restraint principles.

[58] In relation to the garden leave issue, Ms Mills submitted that Mr Kerr’s garden leave should not be treated as a restraint of trade as he continued to be paid during the six-month garden leave period and he continued to receive benefits as an employee. I will deal in turn with each element of reasonableness.

Garden leave

[59] Ms Mills sought to rely on the judgment of the English Court of Appeal in *Credit Suisse Asset Management Ltd v Armstrong*³⁷ which held that there was no relationship between a garden leave clause and a restrictive covenant and, if the covenant was valid, the employer was entitled to have it enforced. The Court in that case did, however, indicate that in an “exceptional case” where a long period of garden leave had already elapsed, “perhaps substantially in excess of a year, without any curtailment by the court, the court would decline to grant any further protection based on a restrictive covenant”.³⁸ The Court, in dismissing the appeal, upheld a post-termination restraint of six months even though the employees had already served a period of six months on garden leave.

[60] *Credit Suisse* has been directly and indirectly applied by the English courts in other cases including:

1. In *Brake Brothers Ltd v Ungless*,³⁹ the High Court of Justice upheld a six-month post-termination restraint in light of a three-month period of garden leave.
2. In *Intercall Conferencing Services Ltd v Steer*,⁴⁰ the High Court of Justice upheld a six-month post-employment restraint on top of a one-month’s period of garden leave already served.

³⁷ [1996] ICR 882 (CA).

³⁸ At 894.

³⁹ [2004] EWHC 2799 (QB) at [59].

⁴⁰ [2007] EWHC 519 (QB).

3. In *Corporate Express Ltd v Day*,⁴¹ it was argued before the High Court of Justice that the court should take into account a three-month garden leave clause (which the employer failed to exercise) when considering the reasonableness of a six-month post-employment restraint. This possibility was considered by the court but it nevertheless determined to uphold the restraint.

[61] In *Tullet Prebon plc v BGC Brokers LP*,⁴² the High Court of Justice briefly considered the interrelationship between garden leave and post-termination covenants as part of a much larger set of proceedings concerning conspiracy and inducement to breach of contract between two brokerage firms. In outlining the law concerning restraint of trade and garden leave, Justice Jack stated:

[224] Where the court considers that the period for which the employer is entitled to protection ends during the time for which the employee may be on garden leave, it will enforce the garden leave provision for that period, and will decline to enforce any enforceable post termination restriction. It will decline the latter because the employer will have already got all the protection he is entitled to, and the Court has the discretion not to enforce an enforceable post termination restriction or covenant where the circumstances are such that it should not.

[225] The court may consider that the period for which the employer is entitled to protection extends beyond the period which is available for garden leave and into the period covered by an enforceable post termination restriction or covenant. The court will then exercise its discretion as to the enforcement of the restriction and will enforce the restriction for the whole or such part of the period provided by the terms of the restriction as is appropriate. ...

[62] Later in his judgment, Justice Jack considered the submission that a six-month post-termination restraint the employees were subject to was unreasonable in that it failed to take adequate account of the possibility of garden leave. That proposition was rejected by the Court, which stated:

[237] ... In my view, where a clause takes no account of the possibility of garden leave it is not thereby made unreasonable. For, as I have set out, in deciding whether to give effect to the covenant, and the extent to which it should be given effect, the court will take account of garden leave. Any necessary adjustment is, as it were, built in by the law. Where a clause takes some account of the possibility of garden leave, but inadequate account, that

⁴¹ [2004] EWHC 2943 (QB).

⁴² [2010] EWHC 484 (QB).

should not put the clause in a worse position than a clause which takes no account.

[63] It appears to me, with respect, that the restatement of the law in *Tullet Prebon* is potentially broader than the law as established in *Credit Suisse*. Whereas in *Credit Suisse* a restrictive covenant in the face of a garden leave clause will be prima facie valid except in “exceptional cases” (possibly where the posited garden leave period is longer than 12 months), under the analysis in *Tullet Prebon* the Court is required to assess the extent to which the employer’s interests are already adequately protected during the period of garden leave and, therefore, whether enforcement of the restraint of trade clause is necessary in all the circumstances.

[64] The relationship between garden leave and post-termination restraints was considered in a different context by the English High Court in *TFS Derivatives Ltd v Morgan*.⁴³ There, the defendant employee (a derivatives broker) was subject to a three-month period of garden leave and a six-month post-termination covenant. It was argued by counsel that the post-termination covenant was inherently unreasonable in that the plaintiff employer had a more reasonable alternative available to it by placing the defendant on an extended period of garden leave. The notion that a hypothetical garden leave clause would be inherently more reasonable than a post-employment covenant was rejected by the court which outlined six reasons for doing so. The first reason was expressed in these terms:

[80] ... Firstly, six months’ notice with enforced garden leave for the whole of that period can legitimately be regarded, in my view, as more onerous for this defendant than the three months’ non-compete clause ... The effect of it would be to keep this defendant out of employment completely and unable, therefore, to exercise his skills as a broker in any capacity. A broker’s skills in the marketplace would tend, it seems to me, to atrophy at least to some extent during six months’ enforced leave. That would be neither reasonable inter parties nor in the public interest.

[65] In Australia the interrelationship between garden leave and a post-employment restraint of trade has been considered in a number of recent cases. In *Tullet Prebon (Australia) Pty Ltd v Purcell*,⁴⁴ the New South Wales Supreme Court was called upon to consider the validity of a restraint of trade in light of an extended period of garden leave. The respondent was employed by the appellant on

⁴³ [2004] EWHC 3181 (QB).

⁴⁴ [2008] NSWSC 852.

a fixed-term agreement for an initial period of two years. A clause in the respondent's employment agreement provided that so long as the appellant did not require the respondent to work, he would be placed on garden leave for the duration of the contractual term or any period of notice given. The agreement also contained a post-employment restraint of three months, which expressly provided that any garden leave undertaken would be set off against this period. Six months into his employment, the respondent sought to leave in order to work for a competitor. Under the agreement either party could terminate by providing three months' notice to the other, but such notice would not expire before the end of the two year term. The appellant therefore refused to terminate the respondent's employment and directed him to remain on garden leave for the duration of the contractual term.

[66] The Court considered that the doctrine of restraint of trade was capable of applying during the currency of the contract, including during any period of notice or garden leave, and that, like a post-employment restraint, such a period would be valid only to the extent that it was not contrary to public policy and was not of a longer duration than was necessary for the reasonable protection of the employer's legitimate interests. The Court held that, in the circumstances a six-month restraint period, three months of which were to be offset by a period of garden leave served during what would otherwise have been the respondent's contractual notice period, was reasonable and that a longer restraint would be beyond that needed to protect the appellant's legitimate interests.

[67] In *Seven Network (Operations) Ltd v Warburton (No 2)*,⁴⁵ Mr Warburton, described as a highly skilled and talented television executive, resigned his employment with the Seven Network and on 2 March 2011 signed an employment contract with a competitor, Network Ten. As in the present case, he was immediately placed on garden leave. Mr Warburton was bound by an employment contract with Seven Network which ran until 14 October 2011. He was also subject to a 12-month restraint of trade clause. Seven Network sought to restrain Mr Warburton from taking employment with Network Ten or any other competitor for 12 months from the expiration of his employment contract on 14 October 2011. Under the conditions of his garden leave Mr Warburton was required to leave the Seven Network premises

⁴⁵ [2011] NSWSC 386.

and was prevented from having access to any of Seven Network's confidential information, clients or staff since that date.

[68] The New South Wales Supreme Court determined that Mr Warburton ceased employment the day he was placed on garden leave concluding that to enforce the 12-month restraint of trade from the expiration of his employment contract on 14 October 2011 would be unreasonable in that it would give more protection to the Seven Network in respect of its confidential information, clients and staff than had been bargained for.

[69] In this Court, in *Marshment v Sheppard Industries Ltd*,⁴⁶ Chief Judge Colgan had before him an interlocutory application for an injunction to enforce a six-month contractual restraint against competitive economic activity. In his consideration of the overall justice of the case, the Chief Judge noted that the employee had been placed on garden leave immediately after he had given one month's notice of his intention to resign, and went on to state:

[54] ... The purpose of the restraint was, among other things, to ... ensure the expiry of confidential information to which he may have been privy during his employment. However, these important commercial consequences were also achieved by SIL ensuring that for his last month of employment Mr Marshment, although paid his salary, was impotent commercially. By this means it may be said that if the company did not literally obtain a further month's restraint, it retained all of the significant benefits of the restraint for that additional period. This is a relevant consideration going to overall justice.

[70] In *Transpacific Industries*,⁴⁷ a three-month non-competition provision was considered against the background that the employee had been placed on garden leave after giving one month's notice, the full Court stated:⁴⁸

So, in essence, the question is whether a clause that prohibits working for a competitor for a period of three months following the end of employment (which may in practical circumstances, be a period of four months from the giving of notice of intention to end employment), is lawful.

[71] After careful consideration of the more recent authorities referred to above, I consider that the correct approach to be adopted is that a garden leave provision

⁴⁶ [2010] NZEmpC 98.

⁴⁷ [2013] NZEmpC 97.

⁴⁸ At [36].

should be taken into account by the Court when considering the reasonableness of the duration of any post-employment restraint covenant.

Duration of restraint

[72] There is no precise formula for determining the duration of the period for which an employer is legitimately entitled to claim protection for confidential information through the use of a non-competition covenant. Ms Mills submitted that even if the garden leave provision was to be taken into account, a 12-month restraint period would be reasonable in all the circumstances in order to protect Air New Zealand's confidential information. Counsel referred to a number of cases in the courts, and in the Authority in particular, where restraint periods of 12-months have been upheld. Mr Chemis submitted that the six months Mr Kerr had already served on garden leave was "more than sufficient to protect Air New Zealand's position." Ultimately, each case will turn on its own facts.

[73] One of the submissions made by Mr Chemis, which was supported by the evidence, was that with one exception, it had been eight months or more since Mr Kerr attended relevant meetings or was in receipt of any of the principal documentation Air New Zealand relied upon. There was unchallenged evidence, for example, that the last Australasian team meeting he attended was in October 2012, the last domestic team meeting was in November 2012, the last Air Nelson board meeting was in December 2012 and the Australasian team meeting on Waiheke Island had been held in June or July 2012. Likewise, the Air New Zealand monthly flyers, monthly management packs, shorthaul updates and monthly balance scorecards were last viewed by Mr Kerr in November 2012.

[74] In his own evidence, Mr Kerr said that "almost my entire focus was on Air Nelson and its operation and not on Air New Zealand and its operation." Mr Kerr pointed out that he had seven direct reports, namely, Manager Flight Operation; Manager Airports; Manager Flight Attendants; Manager Finance; Manager Engineering; Manager HR and Manager Business Improvement. He said that on most days he would spend considerable periods of time working with these managers. Mr Kerr explained that Air Nelson operates its own engineering division

which performs all its own maintenance as well as the heavy maintenance work for Mount Cook Airlines.

[75] Mr Kerr told the Court that during his period with Air Nelson he did not analyse Jetstar because Air Nelson did not compete directly with Jetstar. He explained that, with one exception, Air Nelson did not fly any of the routes that Jetstar did. The exception was that very occasionally, “no more than half a dozen times in my three years with Air Nelson”, Air Nelson would fly between Wellington and Christchurch, which is a Jetstar route, to replace a Mount Cook flight.

[76] All the witnesses who gave evidence in this case were impressive but Mr Kerr was particularly impressive and patently honest. It is not difficult to appreciate why Air New Zealand would have been at pains to retain his services. To the extent that there were any conflicts in the evidence, I preferred Mr Kerr’s version of events. He obviously has considerable management skills and no one questioned his work performance as General Manager of Air Nelson.

[77] Turning to the confidential information Air New Zealand seeks to protect through the non-competition clause, several of the reported cases in this area of the law have made the observation that there is a tendency for employers to overstate the likely effect of the Court’s failure to enforce the restraint sought. Thus, in *Provident Financial Group plc v Hayward*, Dillon LJ said:⁴⁹

... it is very common for the employers to have somewhat exaggerated views of what will or may affect their business ...

[78] Likewise in *Credit Suisse Neill* L J observed:⁵⁰

I recognise the temptations of employers to exaggerate the need for protection.

[79] I have no doubt that in the present case the Air New Zealand witnesses also exaggerated the need for protection. One of the witnesses, for example, stated: “the potential damage that could be caused by the unauthorised disclosure of that information could run into millions of dollars.” I did not find that statement supported by the evidence.

⁴⁹ [1989] 3 All ER 298 (CA) at 304.

⁵⁰ [1996] ICR 882 (CA) at 894.

[80] The confidential documentation produced by Air New Zealand was voluminous and, for the most part, it contained detailed figures and other complex commercial information. The reality is that unless the employee made copies of the documents or otherwise transcribed them in some way, it would be quite impossible to recall the confidential information in his head. I record once again, that there was simply no evidence that Mr Kerr did any of these things or made any other effort to store the confidential information for his future use.

[81] Even had Mr Kerr been able to recall particular aspects of the confidential information in his head, over the passage of time this would have inevitably become progressively stale. The very fact that most of the information was contained in monthly releases would indicate that much of it soon became historical and irrelevant.

[82] There is another unusual aspect to this case. The unchallenged evidence was that Jetstar is a low-cost airline within the Qantas group of companies. The Qantas group is an Australian based international airline which is approximately four times the size of Air New Zealand in terms of fleet and revenue. In [4] above I referred to a development regarding disclosure in this case which occurred on the eve of the hearing. It was dealt with in an interlocutory decision on 29 July 2013. In short, Air New Zealand had focused on a paragraph in Mr Kerr's brief of evidence in which he stated that "Jetstar also sent me some facts and figures in March and April which I have looked at." Counsel for Air New Zealand applied for disclosure of the documentation in question. After inspecting the same, I ordered that the documentation be made available to counsel on a strictly confidential basis. The remarkable feature about the Jetstar confidential information was its general similarity with much of the confidential information that had been produced by Air New Zealand. The disclosure provided substance to the submission made later by Mr Chemis.

89. It can be probably be said that Jetstar knows more about Air New Zealand's revenue, costs and profit per route than Mr Kerr.

[83] In short, I am satisfied that the six-month period Mr Kerr has already spent on garden leave was of sufficient duration to provide Air New Zealand with all the protection it needed in respect of its proprietary confidential commercial information

and I have not been persuaded that the company is entitled to any additional protection through the enforcement of the post-employment restraint covenant relied upon.

[84] Given my conclusion on the duration issue, it is not necessary for me to consider the submissions made in relation to the reasonableness of the scope and geographical area in the restraint clause (see [57] above). It is likely, however, that both restraints would have been upheld although had it been a relevant factor, and had the circumstances called for it, it is likely that the Court would have been prepared to modify the geographical area to exclude Australia. Given the fact that Mr Kerr has taken up employment with Jetstar in New Zealand, however, the issue is simply not relevant for present purposes.

Breach of contract

[85] Air New Zealand's second cause of action against Mr Kerr is based on his alleged breaches of the implied term of fidelity in the respects detailed in paragraph 14(b)(i), (ii) and (iii) of the statement of claim (see [17] above). In respect of the first allegation, namely, that Mr Kerr advised Air New Zealand that he did not intend to comply with the restraint, the short answer is that Mr Kerr was acting on legal advice and he was entitled to have the validity of the restraint provision tested in Court. The evidence was that right from the outset Mr Kerr sought to have the matter referred to mediation.

[86] In respect of the second allegation, namely, that Mr Kerr publicised his appointment with Jetstar while still an employee of Air New Zealand, the evidence was that Mr Kerr informed Air New Zealand that Jetstar would be releasing a press statement the following day and it was Jetstar who released it - not Mr Kerr. He did not provide or authorise the quotation attributed to him in the Jetstar media release. Mr Kerr was never asked any questions by Air New Zealand about the Jetstar press statement and it was never suggested to him that he should retract or clarify any part of the release.

[87] The third allegation is that Mr Kerr allowed Jetstar to provide confidential commercial information to him, thereby creating a conflict of interest. I refer to this

development in [82] above. The evidence was that the Jetstar confidential information was not solicited in any way by Mr Kerr but he did admit to reading the emails when they were received. In his evidence, and to his credit, he voluntarily disclosed receipt of the Jetstar information. Counsel for Air New Zealand made two principal submissions in relation to this particular allegation: (1) that, “by reading this information while still on garden leave, Mr Kerr has also refreshed his memory of Air New Zealand’s confidential information, thereby depriving Air New Zealand of some of the benefit of the garden leave period”; and (2) that “by not disclosing the information to Air New Zealand he put Jetstar’s interests ahead of Air New Zealand’s interests”.

[88] The proposition encompassed in the first of these submissions was not put to Mr Kerr and, in any event, I reject it. In relation to the second submission, as already noted, the documentation was not solicited in any way by Mr Kerr. He was on garden leave at the time and he was lawfully entitled to prepare himself for his new role, so long as his actions did not conflict with his obligations to Air New Zealand. Had he revealed Jetstar’s highly confidential information to Air New Zealand, I perceive that it is likely Mr Kerr would have opened himself up to a more meritorious breach of fidelity claim by Jetstar. In all events, I am satisfied that at all times Mr Kerr complied with his obligations of fidelity.

Conclusions

[89] I have found that Air New Zealand had a legitimate proprietary interest in protecting, through a restrictive covenant, the confidential information identified in its statement of claim. The information in question is effectively akin to a trade secret. However, in my view, the six-month restraint of trade provision which Air New Zealand seeks to enforce in this proceeding is more than what was necessary in order to protect the company’s interest. By requiring Mr Kerr to serve out his six-month period of garden leave, Air New Zealand has already obtained all the protection it is lawfully entitled to. I also confirm that Mr Kerr has not breached any implied duty of fidelity. For these reasons, the action is dismissed.

[90] The defendant is entitled to costs. If they cannot be agreed upon Mr Chemis is to file submissions within 28 days and counsel for Air New Zealand will have an additional 28 days in which to file submissions in response.



A D Ford

Judge

Judgment signed at 10.30 am on 16 August 2013