

IN THE EMPLOYMENT RELATIONS COURT OF FIJI AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 10 OF 2013

BETWEEN: WELLSFORD LIMITED T/A XEROX BUSINESS CENTRE,
FIJI

PLAINTIFF

AND: KRISHNEEL ANAND SHARMA

1ST DEFENDANT

AND: COMPUTECH ELECTRONICS LIMITED

2ND DEFENDANT

Appearances: Mr. Carl Ngamoki- Cameron for the plaintiff.

Mr. A. Pal for the 1st Defendant.

Mr. S. Sharma for the 2nd Defendant.

Coram: The Hon. Justice Anjala Wati.

Date/Place of Ruling: Thursday 15 August, 2013 at Suva.

RULING

CATCHWORDS:

Compliance and Injunction against former employee to restrain breach of employment contract and to comply with contract- jurisdiction to order compliance in disputed cases of breach- powers to order compliance and injunction against current employer in ERC-no jurisdiction- civil court however has powers to order injunction against the current employer.

LEGISLATION:

The Employment Relations Promulgation 2007 ("ERP"): ss. 212; 220.

Cases/Texts Referred to:

Gallagher Group Limited v. Walley [1999] 1 ERNZ 490.

Airgas Compressor Specialists v Bryant [1988] 2 ERNZ 42.

Faccenda Chicken Limited v. Fowler [1986] 1 All ER 617 (CA).

The Cause

1. The 1st defendant is a former employee of the plaintiff who began his employment with the plaintiff as its service technician. He is now employed by the 2nd defendant.
2. The plaintiff employed the 1st defendant from 20 July 2009 for a fixed period of 5 years. The contract of employment of the 1st defendant was to expire on 19 July 2014.
3. On 8 April 2013, the 1st defendant resigned from the plaintiff's employ. The plaintiff now alleges that the 1st defendant has committed several breaches of the contract of employment in that the 1st defendant has:
 - (a) *failed to return the plaintiff its property and confidential information including commercially sensitive trading information with Fuji Xerox Australia;*
 - (b) *been openly soliciting his clients and employees;*
 - (d) *threatened to use or disclose to the 2nd defendant, or has already used and disclosed, or is using and disclosing to the 2nd defendant confidential information and trade secrets including information on the business and financial modelling and contractual arrangements with the plaintiff's existing clients, information supplied by these clients in confidence, customer lists, customer contact details, contacts with or requirements of customers' pricing strategies.*
4. The plaintiff also alleges that the 2nd defendant had induced the 1st defendant to commit the breaches described above.
5. The plaintiff thus seeks injunction against the defendants' in the following forms:-

- (a) *An order for compliance with clause 10 (a) of the employment contract and/or mandatory injunction for the 1st defendant to deliver up to the plaintiff all confidential information in his possession or control, especially the Fuji Xerox Australia ("FXA") payment schedule and price list that he acquired whilst in the employ of the plaintiff without authority to do so, any business and financial modelling information related to the University of the South Pacific, Fiji Government Printery, Fiji School of Medicine and any other clients of the plaintiff, any customer lists, any customer contact details, any contacts and information with or requirements of customers' pricing strategies, any confidential information on investment and development strategies and objectives, and any information supplied in confidence by the plaintiff's clients to the first defendant or the plaintiff or any employee of the plaintiff during the 1st defendant's employ with the plaintiff.*
- (b) *An order for John Lal or one of the plaintiff's senior employee's in his absence, the plaintiff's lawyer and a police officer to enter upon and inspect the 1st defendant's residential property and computer if any, at 154 Sangam Road, Narere, Nasinu, Suva, and his office work station area and computer at the 2nd defendant's head office at 18 Ellery Street, Suva, for the purposes of detaining, taking into custody and preserving any property which is the subject matter of this action, especially any confidential information that is the property of the plaintiff in documentary form or any other form including information in digital form and any confidential information described above .*
- (c) *An order of compliance and/or injunction restraining the 1st defendant from using or disclosing any confidential information and trade secrets learnt from the plaintiff during his employment with the plaintiff to the 2nd defendant or any third party including any confidential information.*
- (d) *An order for compliance and/or injunction restraining the 2nd defendant and its employees or agents from using or disclosing any confidential information and trade secrets received by, from or through the 1st defendant.*

- (e) *An order for compliance and/or injunction restraining the 2nd defendant and its employees or agents from inducing and/or conspiring with the 1st defendant to breach the provisions of the 1st defendant's employment contract with the plaintiff.*
- (f) *Until further order of the Court or until 9.05am on 8 April 2015, whichever comes first, an order of compliance and/or injunction restraining the 1st defendant from directly or indirectly soliciting any of the plaintiff's 518 clients or 18 employees that were clients or employees of the plaintiff during the term of the 1st defendant's employment with the plaintiff.*

The Substantive Causes of Action

- 6. By a writ, the plaintiff pleads many causes of action against the 1st defendant which includes breach of contract for failing to return the company property, breach of contract for using and disclosing confidential information, breach of contract for soliciting the plaintiff's clients and employees, breach of fidelity duty, conflict of interest, and breach of contract by resigning before the expiration period therefore occasioning loss to the plaintiff on training the 1st defendant.
- 7. The causes of action against the 2nd defendant is inducement to breach contract and conspiring by unlawful means to breach the agreement.

Affidavits of Parties

- 8. All the parties have filed an affidavit each on which they relied on substantially to argue the interim cause. From the affidavit of the plaintiff's director, it is discernible that he is seeking the compliance and/or injunction on three major breaches by the 1st defendant and one breach by the 2nd defendant.
- 9. For reasons of clarity, I would thus summarise the affidavit of the parties under different heads on which the compliance or injunction orders are based.

Confidential Information

10. The plaintiff asserts that the 1st defendant has threatened to use, has used, or is using its confidential information. It thus is asking for return of the same and that the 1st defendant be restrained from using or disclosing these information. The plaintiff is also asking for Anton Piller order against the 1st defendant.
11. In support of his application, the plaintiff has alleged that at the commencement of the employment, the 1st defendant had no relevant experience to be employed but after his second interview, the plaintiff felt that he had good prospects of success and so he was employed. The 1st defendant signed a contract of employment and a confidentiality agreement. He was, after being employed, sent overseas several times to be trained and a sum of approximately \$60,000 was spent on his training. This was done with the hope that the 1st defendant would invest the training knowledge in the plaintiff's company for at least the period of fixed employment.
12. It is alleged that upon an internal investigation by the plaintiff, it was revealed that prior to his resignation and in March 2013, the 1st defendant was harvesting confidential information and trade secrets from his company for his own use and likely for the use of the 2nd defendant.
13. The plaintiff alleges that the 1st defendant, without authority to do so, remotely accessed through the internet and downloaded certain confidential information and trade secrets from the plaintiff's secured and restricted server and executive document management system. The 1st defendant used his password and accessed these information. These information was not required for his work. The confidential information included commercially sensitive information about the plaintiff's full buying history with FXA (month by month) from 2011 to March 2013. This information represented the trading and supply history between plaintiff and FXA for certain equipment and parts. The 1st defendant is alleged to have downloaded the information to an unknown computer or even a computer belonging to the 2nd defendant. The 1st defendant is alleged to have

downloaded this information on various dates with his user name and password and even the user name of Mr. John Lal, the Managing Director of the plaintiff.

14. In the letter of application for a job, it is alleged that the 1st defendant clearly represented that he was willing to use the plaintiff's business ideas, confidential information, trade secrets and customers for the benefit of the 2nd defendant. After receiving his application letter, the plaintiff's General Manager called the General Manager of the 2nd defendant, Mr. Avinesh Krishna and informed him about how the plaintiff had invested in the 1st defendant and that it was not correct for him to resign and that it intended to bring injunctive relief application if the 1st defendant breached his obligations to the plaintiff to keep his business and trade secrets confidential and not to solicit his customers and employees. Mr. Avinesh Krishna indicated to the plaintiff that he would not employ the 1st defendant but later he did and refuses to even answer the telephone calls of the plaintiff company.
15. The 1st defendant denies harvesting, extracting, compiling or in any manner dealing with confidential information of the plaintiff other than for purposes related to the performance of his work obligation with the plaintiff when he was employed. As part of his day to day task, he had access to confidential information. The plaintiff knew of this. It had given him the authority to access information as it was fully aware that he could not perform his work obligations without these information. Mr. John Lal and the IT Manager had access to his login details to the file server where the entire information is stored. The plaintiff therefore had the ability to know the details of the 1st defendant accessing the server. It would not have been possible to be having unauthorized access to confidential information without Mr. John Lal or the IT manager knowing. The 1st defendant says that between the periods of 9 April 2013 to 12 June 2013, a period of two months, this issue of harvesting, using and keeping confidential information was never raised. He states that he had a laptop, a phone, proximity card, office keys, vehicle and login keys which belonged to the plaintiff. Upon his resignation he returned all the materials. The accounts would have been deactivated. After he left he has not had access to the plaintiff's information.

16. The 1st defendant further says that he had authorized access to EDMS. His login details gave him access to EDMS. If he had no authority, how could he use his login details to access the EDMS? On numerous occasions, he had to work from home and so remotely access EDMS from his home. The plaintiff is fully aware of this. This was never an issue for the plaintiff when he was working for it and the plaintiff has had full knowledge that he was accessing EDMS from home. He used to use the laptop given by the plaintiff to access the EDMS. He has not at any point in time accessed or downloaded information to any different or unauthorized computer.
17. The 1st defendant says that his letter for a job application with 2nd defendant was obtained from his email account by John Lal without his permission. He had fallen out with the plaintiff; there was no reason for him to forward his job letter to John Lal. John Lal also signed the letter as if he signs it. In that letter he meant that he would put his ideas for development of the 2nd defendant's business. The contents of the letter are being distorted.
18. The 2nd defendant denies having asked the 1st defendant for any confidential information or having relied on any one of it. The 2nd defendant says that it has got the quality of the business which attracts the clients.

Solicitation of Clients

19. It is alleged that the 1st defendant has solicited the plaintiff's clients, the Fiji School of Medicine ("FSM"), the Fiji Government Printer ("FGP"), Tapoos Nadi ("TN") and Maritime Safety and Authority of Fiji ("MAF").
20. The FSM had been a long outstanding client of the plaintiff. It provided quotations to FSM for supply of certain products on 9 April 2013. At that time the 1st defendant was still working and had the knowledge of the quotation. Now the business is taken up by the 2nd defendant.
21. The FGP is also a long outstanding client of the plaintiff and the 1st defendant is well aware of this customer's needs and is able to service their production printers.

22. The 1st defendant has been conspiring with the 2nd defendant and Fuji Xerox New Zealand to solicit work from FGP. In late May and June this year the first defendant, the 2nd defendant and the FXNZ conspired to takeover the regular servicing needs of the productions printers of FGP. They all arranged for a New Zealand engineer to be sent from NZ, on a one-off basis, to service FGP's production printers with the 1st defendant and another engineer from 2nd defendant on Monday 17 and Tuesday 18 June 2013. The FGP was also offered an unsustainable 30 percent discount on any spare parts required.
23. The 1st defendant has also been spreading misleading information to employees of FSM and FGP that the plaintiff and its employees are not qualified or capable of repairing and servicing the needs of FSM and FGP.
24. The 2nd defendant has supplied new photocopier to TN and MSA of Fiji. This is because the 1st defendant solicited this job.
25. The 1st defendant stated he has not at any point in time gone to these customers and contacted them for any job. The customers' know him and they contacted him but he has not gone to the plaintiff's customers and has asked them to move to the 2nd defendant.
26. The 1st defendant states that the business was given to 2nd defendant on its merits. It was solely FSM's choice to use 2nd defendant. He has nothing to do with the plaintiff having lost the customer. The plaintiff could not service the needs of the FGP. The deal with TNand MSA had taken place prior to him joining the 2nd defendant. After joining he installed the machine at MSA.
27. The 2nd defendant states that it is growing because of the quality of the business it provides at a cost which is affordable. It has not solicited any clients or grown at the expense of the 1st defendant.

Solicitation of Employees

28. The 1st defendant is alleged to be openly and blatantly soliciting the plaintiff's employees to work for the 2nd defendant and conspiring with the 2nd defendant to do so.

29. The plaintiff alleges that in June this year it interviewed two former employees of the 2nd defendant for jobs with his company. These employees are Edwin Kumar and Niraj Naicker. These employees told him that they resigned from the 2nd defendant's employment due to being pressured by Mr. Avinesh Krishna, the Managing Director of the 2nd defendant to poach customers from their former employees.
30. The plaintiff alleges that on 21 May 2013 the 1st defendant and one employee from the second defendant met its employee at the Fiji Meterological Office in Nadi and offered to employ him for a salary of \$13,000. At the same time the 1st defendant boasted to Sanjay Chand that a former employee of the plaintiff had also joined the 2nd defendant.
31. The plaintiff's employee was also telephoned by someone, purportedly the 2nd defendant and offered employment with that company for a salary of \$17,000. The plaintiff suspects that this offer was either made by the 1st defendant or someone using information from him.
32. The 1st defendant denies soliciting the plaintiff's employees. He states that the plaintiff's employee Shanil Kumar approached him and asked if there was a vacancy with the 2nd defendant and if he could arrange an employment for Shanil Kumar.
33. Mr. Sanjay Chand had applied for a job with the 2nd defendant and was even interviewed prior to him joining the 2nd defendant.
34. He did not call any Shavneel Kumar. He has not made any arrangements with any employee to leave the employment of the plaintiff. He did not offer Monita any job and he did not make any offer for a job to Sanjay Chand with the 2nd defendant.
35. The 2nd defendant states that the plaintiff's employees have come to it because they wanted employment not that it sought after them. One Monika and Sanjay Chand came to the 2nd defendant before the 1st defendant. The 1st defendant came to it for an employment because of his difficulties and he was employed on merits and not to grow its business.

Inducement by Second Defendant

36. The plaintiff alleges that after the training of the 1st defendant he became a very attractive prospective employee of the 2nd defendant as it has in February this year acquired its Fuji Xerox distributorship for Fiji from Fuji Xerox New Zealand. The plaintiff's business was established in Papua New Guinea in 1977 and it opened operations in Fiji in 2008. It is alleged that the 2nd defendant's General Manager, Avinesh Krishna, or another employee of the 2nd defendant had been in contact with the 1st defendant in February or March this year to encourage him to resign and work for it.
37. The plaintiff had taught the 1st defendant its secret business and financial modelling for the USP, its former client, which has now appointed the 2nd defendant as their local Fuji Xerox dealer when initially it was not successful when USP conducted a public tender process. The 2nd defendant would have sought out the 1st defendant with a view to acquiring the confidential information and induced the 1st defendant to breach his employment contract.
38. The 1st defendant denies being induced, influenced, encouraged or compelled by 2nd defendant to breach any terms of his employment. He said that he resigned because he had personal problems with his work. He had a lot of workload, he was being interfered in his private life by the directors and disrespect was shown to his mother and his girlfriend by unwanted remarks to him.
39. The 2nd defendant denies playing any part in getting the plaintiff's employees. It says that it also trades Fuji Xerox products and services. It has marketed its product and so is getting clients and employees who want to join it. They do so by their choice and not by inducement.

The Submissions of Parties

40. I had asked the parties to first address me on the aspect of jurisdiction of the Court to grant the relief in the form sought against the parties. All the parties addressed the

Court on the issue of jurisdiction, as well as whether there is any basis to grant the relief sought.

41. On the question of jurisdiction, the counsel for the plaintiff submitted that under s. 220 (1) (i) of the ERP, the Court can make any order the Tribunal may make under any written law relating to contracts if an action is founded on an employment contract. . S. 212 (1) (a) authorizes the Employment Relations Tribunal to make orders for compliance with the contract. The counsel argued that since an action is founded on an employment contract, the ERC has the jurisdiction to grant compliance orders sought against the 1st defendant.
42. Mr. Carl Ngamoki- Cameron further argued that the action against the 2nd defendant is in tort and s. 220 (1) (m) empowers the ERC to hear and determine proceedings founded in tort relating to the Promulgation. Mr. Carl argued that the cause of action against the 2nd defendant is in tort because he induced or conspired with the 1st defendant to breach the contract of employment thereby occasioning loss to him and as such the Court clearly has jurisdiction to hear the case.
43. Mr. Carl submitted that there are serious questions to be tried and there is a strong prima facie case for the plaintiff. The plaintiff says that there are clear breaches of the contract of employment and common law and tort committed by the 2nd defendant when he induced or conspired with the 1st defendant to breach his contract of employment.
44. The plaintiff's counsel further stated that irreparable harm will be caused to the plaintiff if an injunction is not granted. This is a case in which the plaintiff cannot be adequately compensated by damages. The plaintiff is suffering loss and damage to its reputation with its customers and Fuji Xerox Australia and other parties and its ongoing inability to protect its confidential information and trade secrets. This is causing it difficulty in retaining existing valuable clients. The defendants would not suffer any loss and if any loss or damage is suffered, they are protected by the plaintiffs undertaking as to damages.

45. Mr. Carl stated that the balance of convenience with ensure the status quo is maintained and the defendants' will not be at a loss at all.
46. The counsel for the plaintiff also asserted that the 1st defendant has not given any undertaking as to damages and the 2nd defendant's undertaking as to damages is vague and unenforceable.
47. Mr. Pal's argument on jurisdiction was incomprehensive. I made out from his oral statements that the matter in the ERC should have been heard by the Civil Court and the orders sought are beyond the scope of the ERC.
48. Mr. Pal also argued that the confidentiality agreement is not part of a contract and therefore any breach of the same is not a breach of the contract. According to Mr. Pal, there is no consideration flowing in the confidentiality agreement and so the agreement is unenforceable.
49. On the undertaking as to damages, Mr. Pal stated that Mr. John Lal was not authorized by the company to give undertaking as to damages.
50. On the penalty clause which states that if the employee leaves the employment before the fixed period, he will have to pay a sum of \$25,000, it was argued that this clause together with the restraint of trade clause is invalid because it stops the 1st defendant from openly competing in the market.
51. Mr. Pal stated that the plaintiff has not come to the Court with clean hands. The plaintiff through its employees had interfered in the personal life of the 1st defendant and to an extent that it was intolerable. This made the employee's stay so difficult that he had to resign and leave the employment. Before the action was filed, the plaintiff had occasion to write to the 1st defendant and to talk about the breaches of the employment contract. The issue of confidentiality was never raised.
52. It was further argued that there was no evidence of any breach of the contract. All was a speculation.

53. Mr. Sharma very strongly argued that there is basis on which the injunctive relief ought to be granted. There is no evidence of keeping property, harvesting and using confidential information and soliciting employees and clients.
54. It was argued that compliance order is not possible against the 2nd defendant. The pre-condition of a compliance order is that there be a contract and if there is no contract between the plaintiff and the second defendant, there cannot be any compliance order granted against it.
55. Mr. Sharma further argued that if an action is founded on an employment contract, the ERC indeed has powers to order compliance but the compliance order is a relief/remedy and a second step process. The first step is to conclusively ascertain the breach in a disputed case and if the breach is established, compliance order can follow.
56. Mr. Sharma stated that the employment ceased on 18 April. The 1st defendant was employed by the 2nd on 1 May. From April to July, the plaintiff did nothing. Then it sees a decline in his business so he blames someone to bolster its business. It cannot compete in the market with the 2nd defendant and it wants the Court to assist it in getting clients for it. One such example is FGP. That customer refused the plaintiff's service because the plaintiff was incapable of servicing the needs of the plaintiff.
57. Mr. Sharma says that the writing of the emails by the employees in no evidence of solicitation. These emails are self serving and self-orchestrated evidence on which no weight can be placed.
58. Fuji Xerox Australia and New Zealand have their own website and the 2nd defendant can log on its website to get information about its dealing. There is no need to use information of the plaintiff.
59. Mr. Sharma argued that the plaintiff is only a trader in goods. It buys from Australian market and sells in Fiji. Once it had the monopoly, not now. If it is buying from Australia and selling in Fiji, there is no trade secret. There is no intellectual property. The 1st defendant is only a service technician and he does have any authority or powers

to interfere with the plaintiff's customers and employees or interfere with any trade secret.

The Law and Analysis

60. The first question is that of jurisdiction to hear the interim cause against the 1st and the 2nd defendant. The order for compliance against the 1st defendant is indeed permissible under s. 220(1) (i) of the ERP. Under s. 220 (1) (i) of the ERP, if an action is founded on an employment contract, the ERC has power to make any order that the ERT may make. Under s. 212 (1) (a) of the ERP, the ERT is empowered to make an order for compliance of an employment contract.
61. Under s. 212(1) (a), it is not a mandatory requirement that an action be founded on an employment contract. However there is this requirement in ERC that before any compliance orders are granted, an action be founded on an employment contract. There has to be a reason for requiring an action in employment contract to be founded for an order for compliance to be given. The reason is that the order for compliance pursuant to an action for an employment contract is normally reserved as a final remedy. The use of compliance as an interim remedy may be granted in limited circumstances where the breach complained of can be conclusively established on affidavits. In other words if there is a validly contested breach, the employment action has to be decided first. If the breach has been established, the remedy of compliance can follow.
62. The next question is that of jurisdiction against the 2nd defendant. The purpose of the ERP is to provide a statutory framework to provide a structure of rights and responsibilities for parties engaged in employment relations. There is no contract between the plaintiff and the 2nd defendant so any action for compliance of the contract by the 2nd defendant is unsustainable.
63. The plaintiff says that the cause of action against the 2nd defendant is in tort and that s. 220 (1) (m) allows for an action in tort to be heard by the ERC. S. 220 (1) (m) states that

the ERC has jurisdiction *“to hear and determine proceedings founded on tort relating to this Promulgation”*.

64. The plaintiff has not shown to me that the inducement and the conspiracy alleged against the 2nd defendant is a tort prescribed by the Promulgation or relating to the Promulgation. I thus do not find that the acts complained of against the 2nd defendant are actionable under the ERP by an injunction against a party who was not or is not in an employment relationship. The proper forum for injunctions against third parties such as this is the civil Court.
65. Any action for injunctive orders on the main cause of action for tort is unsustainable. In the main cause of action, the plaintiff will have to establish that the acts complained of is a tort under the Promulgation or is a tort relating to the Promulgation.
66. I thus refuse to grant an injunction against the 2nd defendant at this stage of the proceeding.
67. Let me now ascertain whether the plaintiff has established by the affidavit that the 1st defendant breached the contract of employment by breaching the confidentiality provision and the provision against solicitation of clients and employees.
68. The first alleged breach is in regards the confidential information. I accept that the confidentially agreement is part of the contract document. It was executed on the same day and the consideration was that the 1st defendant would be paid the agreed salary. It is nonsensical for Mr. Pal to argue that the confidentiality agreement is not a contract.
69. It was undoubtedly a part of the employment term that the employee will after the termination of his employment not part or use the confidential information belonging to the plaintiff and that the 1st defendant would return the same when his employment comes to an end.
70. There is no reliable evidence before the Court which substantiates the allegation that the 1st defendant is in breach of his employment contract by harvesting, obtaining and using confidential information of the plaintiff.

71. The plaintiff is relying on the 1st defendant's login activity history generated by it which indicates the number of times the 1st defendant has extracted the plaintiff's confidential information. Those information that 1st defendant extracted was during the course of his employment. The 1st defendant could not have possibly extracted those information without being given the permission. The 1st defendant would need the username and password to access these details and the plaintiff has to authorize the username and the password. Further, the plaintiff gave the 1st defendant a computer to use at home and that indicates that the plaintiff knew that the 1st defendant would work from home at his computer. If the 1st defendant was not to have access to the confidential information, there would be no reason to ask him to enter into a term of the contract that he would not use the confidential information except for the benefit of the plaintiff.
72. If the 1st defendant had any access to the plaintiff's information after his employment with the plaintiff ceased, the extract would have shown that he used his previous login details to access the data. There is no such evidence against the 1st defendant.
73. I also find that it is not a difficult business to deactivate the 1st defendant's account now to ensure that he does not login to obtain any further information. The plaintiff can control its own process and information.
74. The plaintiff then uses the 1st defendant's letter of employment to the 2nd defendant and is asking the Court to find that the letter is indicating that the 1st defendant had threatened to use the knowledge he obtained from the plaintiff to build and grown the business of the 2nd defendant.
75. The letter reads:

"I am writing to express my interest in Xerox Service Managers position in Daltron Fiji. I have been working for Fuji Xerox Business Centre for past four years as a Service Manager/ Senior Technician Support Personnel. The experience that I have gained working on Fuji Xerox products and with Fuji Xerox Business Centre would best fit the above position and would be an advantage to Daltron Fiji as I would also input relevant and necessary business ideas if selected. In past four years I have worked on all

office colour and mono products, printers, entry level production machines and software. I have also done product trainings in Fuji Xerox Australia, online training for Document Messaging platform and also online training for printers through Fuji Xerox Printers Australia.

Not only products, but I have built a great network with customers which I believe Daltron would be really kin for.

If given an opportunity I will prove myself providing the best knowledge and experience that I have in growing the Daltron Fiji through Xerox..."

76. This letter for a job application dismisses the plaintiff's allegation that the 1st defendant was induced by the 2nd defendant to join its employment. If there was any inducement, the 1st defendant need not apply for a job in the private firm. He would have simply joined the 2nd defendant on its invitation.
77. I do not expect the 1st defendant to write a letter which is legal in nature. He wrote in his capacity as an employee who was desperate for a job to leave the plaintiff's employment. He had to show the 2nd defendant that he had some expertise and what he was prepared to do with his expertise and the possible benefits the 2nd defendant may have in employing him. In any letter of application in a private firm, an employer looks for the previous relevant experience which would assist the growth of the business and how the expertise can be utilised for its business purpose. The 1st defendant did what any employee would do in writing a letter of employment. I do not find from the letter of application for a job anything which calculates to a threat to use confidential information of the plaintiff company. Even if any paragraph looks offending to the plaintiff, I must say that the plaintiff must show some evidence of the 1st defendant having executed the threat.
78. The 1st defendant says that he did not mean in his letter what the plaintiff interprets it to be. What actually the 1st defendant meant needs to be tried under oral evidence and a

conclusive finding made that the letter meant that the 1st defendant would breach the contract and that he did.

79. The plaintiff's second allegation is that of breach of the employment contract in that the 1st defendant is soliciting the clients and the employees of the plaintiff contrary to clauses 12 (a) and (b) of the employment contract. There is no conclusive evidence of any solicitation by the 1st defendant. The plaintiff has lost his clients to the 2nd defendant. There is uncontradicted evidence of the 1st defendant that USP, FGP, FSM, TN and MSA all entered into a deal with the 2nd defendant prior to the 1st defendant joining the employment of the 2nd defendant.
80. The clients mentioned by the plaintiff are big clients who use Fuji Xerox products. The plaintiff and the 2nd defendants are dealers of the said product. In a world of business, it is acceptable that clients will come and go depending on whether they are happy with the service that is offered to them. In this case there is no evidence that the clients moved because of the 1st defendant. The 1st defendant is only an employee. The clients deal directly with the company and if they are not satisfied with a service provided by the company, they are at liberty to leave. The plaintiff must give evidence of solicitation. It is not enough to show that the clients have changed the service providers but there ought to be a proof on the balance of probability that the clients moved because of the solicitation. Apart from speculation and conjectures, the plaintiff has not provided any evidence of an actual or threatened injury by the 1st and the 2nd defendant.
81. As a dealer in a product where there is competition, the 2nd defendant is bound to market its product and increase its customer base. It is under no obligation to the plaintiff not to approach its client to deal with them for growth of its business. If the clients are happy on the service provided by the 2nd defendant, they have a right to change their providers. The plaintiff cannot expect a copyright on the clients.
82. I am fortified in my view that the clients have changed the service provider because they felt that the 2nd defendant is going to meet their needs. In one of its email, FGP confirms that the plaintiff is not in a position to cater for its needs. That indicates the reason for

the switch. After the clients switched the service providers, there is evidence that the 1st defendant in his capacity as employee went and serviced the customers. Does this constitute a breach of the restraint of trade clause? The 1st defendant has challenged the restraint of trade clause and whether it is valid or not is not something I should deal with at this stage. I will leave it for determination after the trial since that is one of the main causes of action save to say that the principles to be applied in assessing the reasonableness and therefore enforceability of a restraint of trade clause are well settled. The Court of Appeal in *Gallagher Group Limited v. Walley* [1999] 1 ERNZ 490 has reiterated some of those principles in the context of employment law:

- *Covenants restricting the activities of employees after the termination of their employment as a matter of legal policy are regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interest of the former employer and in the public interest.*

Public interest requires that the right of every person to trade freely and be freely employed is limited by a restraint that is reasonable. Proprietary interests to be protected include trade secrets, confidential information, and business or trade connections.

Airgas Compressor Specialists v Bryant [1988] 2 ERNZ 42.

The use of confidential information is protected post-employment if its use results in a former employee being given an undue advantage in competition with a former employee.

Faccenda Chicken Limited v. Fowler [1986] 1 All ER 617 (CA).

- *The reasonableness of the restraint clause is to be determined at the time the contract was entered into.*

Measures of reasonableness can be the duration, the geographical ambit, and the scope of the term.

Airgas (supra).

- *The onus is on the party asserting the reasonableness of the covenant.*
- *Consideration is necessary but may be satisfied by the mutual promises intrinsic in the offer and acceptance of employment.*

83. The third allegation is that the 1st defendant and the 2nd defendant have been soliciting the employees of the plaintiff. There is no contractual obligation entered into by the plaintiff and the 2nd defendant that it will not employ the plaintiff's employees. The plaintiff itself admits that it interviewed two of the 2nd defendant's former employees. If the plaintiff can do that, why can not the 2nd defendant employ the plaintiff's employees?

84. Nevertheless, there is no evidence of solicitation by the 1st defendant. There is uncontradicted evidence from the 2nd defendant that the employees named Monita and Sanjay Chand had sought employment from the 2nd defendant well prior to the 1st defendant joining the 2nd defendant. If the 1st defendant was not employed by the 2nd defendant then how would the 1st defendant have any influence on the decision making? Even after the employment, the 1st defendant had no influence in the selection process or at least there is no evidence that he was in the interview panel or decision making panel or a person with any authority to influence the decision. He was a newly appointed employee who neither had any authoritative status nor any power to guarantee any employment to anyone.

85. There are emails by the employees' of the plaintiff who allege that they were being approached by the 1st and 2nd defendant to work for them. I find the unsworn emails unreliable to establish breach. Apart from the employees' allegation, there is no substantial evidence for example evidence of phone calls being made to the plaintiff's employee from the 1st or the 2nd defendant.

86. The alleged breaches are disputed and I do not find the dispute raised by the 1st defendant to be a sham and as a result I do not find any basis to order compliance of the

contract or to grant any Anton Piller orders. The breach has to be established conclusively in the main trial.

87. I dismiss the application for compliance and order that both the defendants' are entitled to costs of this proceedings in the sum to be ascertained after I hear from the parties.
88. The matter must now take its normal course.

Anjala Wati

Judge

15.08.2013

To:

1. *Mr. Carl-Gameron Namaki for the plaintiff.*
2. *Mr. A. Pal for the 1st defendant.*
3. *Mr. S. Sharma for the 2nd defendant.*