IN THE EMPLOYMENT COURT
WELLINGTON

WC 12B/07
WRC 9/07

	IN THE MATTER OF	proceedings removed from the Employment Relations Authority
	BETWEEN	CREDIT CONSULTANTS DEBT SERVICES NZ LIMITED Plaintiff
	AND	DAVID WILSON First Defendant
	AND	EC CREDIT CONTROL LIMITED Second Defendant

Hearing: 16, 17 and 18 April 2007
(Heard at Wellington)

Appearances: Les Taylor and Megan Richards, Counsel for the Plaintiff
Gary Tayler, Advocate for First and Second Defendants

Judgment: 1 May 2007

JUDGMENT OF JUDGE C M SHAW

---

[1] David Wilson was made redundant from his position of general manager of Credit Consultants Debt Services NZ Limited (Credit Consultants) in December 2006. In February 2007 he accepted an offer of employment with EC Credit Control Limited as New Zealand corporate sales manager.

[2] Credit Consultants alleges that Mr Wilson has breached three terms of his employment agreement by working for an opposition company, misusing confidential information, and soliciting its customers and prospective customers. It also alleges that EC Credit Control has aided and abetted those breaches and seeks a penalty against it.

[3] Mr Wilson says that the terms of the restraint of trade in his employment agreement with Credit Consultants were unreasonable but accepts in some regards he has acted improperly. EC Credit Control denies that it has done anything to warrant a penalty.

[4] On 16 March 2007 Credit Consultants obtained interim orders restraining Mr Wilson from further breaches[1] pending a full hearing of the allegations.

[5] Some preliminary jurisdictional questions raised by the proceedings were decided by a judgment of the full Court on 5 April 2007[2]. Following that, the plaintiff filed a statement of claim which refined the causes of action and remedies sought.

[6] Against the first defendant the plaintiff seeks:

1. Four permanent injunctions restraining the first defendant from breaching his employment agreement.
2. An order requiring the first defendant to comply with three clauses in his employment agreement.
3. A penalty for breach of the employment agreement.
4. Damages plus interest on any damages awarded for loss of business the first defendant's actions have caused the plaintiff.

[7] At the hearing, Mr Taylor advised that the plaintiff was no longer seeking a permanent injunction in respect of the breach of the confidentiality clause as a compliance order would be sufficient to meet the plaintiff's needs. He also accepted that any injunctions ordered in relation to clauses which restrain the first defendant for a limited period of time could not be permanent.

[8] Against the second defendant the plaintiff seeks:

---

[1] *Credit Consultants Debt Services Ltd v Wilson*, unreported, Travis J, 16 March 2007, WC 12/07
[2] *Credit Consultants Debt Services Ltd v Wilson*, unreported, full Court, 5 April 2007, WC 12A/07

1. A penalty for inciting, instigating, aiding, or abetting the first defendant to breach his employment agreement.
2. Damages plus interest for the plaintiff's loss of business caused by the second defendant.

[9] The claims for damages against each defendant will be heard separately after judgment has been given in the present case.

The facts

[10] The plaintiff company was established by Christine Hyett in 1997 as Credit Consultants (NZ) Ltd as part of a group of credit consultants. In 2002 it became Credit Consultants Debt Services (NZ) Ltd. Ms Hyett is managing director and sole shareholder of it and the other companies in the group.

[11] Credit Consultants has offices in Wellington, Palmerston North, and Auckland with 32 staff. Its prime function is to provide debt recovery and credit related services to clients which range from small businesses to major companies and large government agencies.

Employment by Credit Consultants

[12] In December 2001, Mr Wilson was employed as general manager, Central and Southern by Credit Consultants (NZ) Ltd under an individual employment agreement. He reported directly to Ms Hyett. Christopher Lintott was employed the same year as general manager, Northern Region, and together with Ms Hyett they formed the management team. Mr Lintott was originally employed by Credit Consultants Auckland Ltd but as the structure of the group of companies changed so did his job and he moved to Credit Consultants Group NZ Ltd from which he ran the northern region debt services department for Credit Consultants Debt Services (NZ) Ltd.

[13] Mr Wilson's individual employment agreement contained three clauses relevant to this case:

7. Restraint Of Trade

7.1 The Employee shall not at any time, during the term of this Agreement or for a period of six (6) months after the termination of this Agreement:
(a) work for any opposition company or business that is involved in the same or substantially the same business within New Zealand; or
(b) set up a business in competition with the Employer's business within New Zealand, without the express written consent of the Employer.

7.2 The Employee shall not at any time, during the term of this employment or for a period of six (6) months after the termination of this employment, either on the Employee's own account or for any other person, firm or company, solicit, endeavour to entice away or discourage any client of the Employer from remaining as a client of the Employer.

25. Confidential Information

25.0 During the period of employment the Employee will obtain or have access to confidential information relating to the business of the Employer. The Employee agrees that such information shall not be conveyed in any manner or form to any person, except as authorised by the Employer, either during or after the termination of employment. The Employee shall not make use of such information for any purpose other than the discharge of duties under this employment contract.

…

31. Non Solicitation

31.0 The Employee shall not at any time during the period of employment or for a period of 6 months after termination of employment, for whatever reason, either on the Employee's own account or for any other person, firm, organisation or company, solicit, endeavour to entice away from or discourage from being employed by the Employer, any other Employee or actual client/customer or prospective client/customer of the Employer.

[14] Mr Wilson's tasks and duties were listed in a schedule as:

- *To introduce, develop maintain and grow profitable business associations for the Company and/or Group.*
- *To assist in growing existing relationships with Clients.*
- *To assist in developing marketing strategies for the Company and/or Group.*
- *To work towards achieving budgets set by the Director of the Company and/or Group.*
- *To represent Credit Consultants at external functions as and when required.*
- *To appoint and ensure training of staff as and when required.*
- *To report to the Director of the Company and/or Group or such other person as advised in a timely manner as required*
- *To be an effective team member contributing to the overall success and profitability of the Company and/or Group.*
- *To manage day to day functions as required.*
- *Assisting with all other areas of work as and when required.*
- *To represent the Company and/or Group in a professional manner.*

[15] When he was offered the position, Mr Wilson carefully considered the draft agreement and e-mailed Ms Hyett with queries and suggested changes. He did not refer to the restraint of trade clause in this e-mail but did speak to her about the

geographical area it covered. He then signed the agreement without any alteration to the restraint of trade clause. He did not query the confidentiality and non-solicitation clauses.

[16] Ms Hyett had specific reasons for including these clauses in the agreement:

- The first 6 months after leaving a job was very important because vital information could still be retained by the employee.
- Mr Wilson's position in the company was extremely important and the scope of his marketing was not limited to the Wellington area but covered greater Wellington and the South Island.
- Mr Wilson and Mr Lintott were privy to a lot of extremely confidential information which was shared at regular management meetings and she wanted to protect that information.

[17] She told the Court very frankly that she had left her previous employment without a restraint of trade and knew how easy it was to secure clients for her new company from her previous employers in the first few months.

[18] Although Credit Consultants only has branches in Wellington, Palmerston North, and Auckland, Ms Hyett said the company has an active national business operating all over New Zealand. The lack of a branch in a particular region does not mean that her company does not do work with clients in that region.

[19] Mr Wilson was responsible for the other consultants within the Wellington and Palmerston North areas. He acted as a mentor and assisted them to help secure business. The company did not have an office in the South Island to avoid replicating the infrastructure there but from the time Mr Wilson was employed it had 12 South Island clients who were large enough to create significant wealth for the business. The client base for the Auckland office ranged from Kaikohe and Whangarei to Tauranga.

[20] It was not disputed that throughout his employment Mr Wilson had access to a substantial amount of confidential information including full client lists, client

revenue, costings, levels of activity between the clients and the company, and complete supplier lists and agreements although Mr Wilson said that his knowledge about these matters was limited to the Wellington and Palmerston North areas. He maintained that he had had no experience in the Auckland region where he attended only one client function 3 or 4 years ago. Mr Wilson told the Court that, while Credit Consultants dealt with business nationwide, his role was not nationwide. In any event he said that all access to the information he did have ended with his employment

[21] I find that while Mr Wilson's direct responsibilities were for the Wellington and Central North Island areas as well as the South Island, he was also privy to the same important and confidential information about the company's client pricing structure and customer strategies as Mr Lintott through regular management meetings. His job description does not limit his activities to his region.

[22] Ms Hyett said that Mr Wilson was a true advocate of proactive account management. He gleaned knowledge of his clients' business needs at their initial meeting and then accumulated these over time. At any point in time Mr Wilson would be able to quote the company's collection rate for any of his major clients as well as their commission and charging structure within the company, key client contacts, and other information that was important to the client/company relationship. He had full access to information on the clients not only under his portfolio but also those of consultants who he managed. She said this information included but was not limited to revenue, client costs, and activity levels.

[23] Mr Wilson did not deny this but disputed the inference that he could retain this information indefinitely and needed to refresh his memory before each client contact.

[24] On 22 December 2006 Mr Wilson was made redundant from his employment with the company as a result of a restructure which led to the two positions of general manager being disestablished. In their place a new position of national marketing manager was created based in Auckland. Mr Wilson did not apply for this new position and Mr Lintott was appointed. Mr Wilson was obviously very unhappy

at having been made redundant but did not challenge its lawfulness then or subsequently.

[25] I am satisfied that at the time and for a period after he was made redundant Mr Wilson had no intention of setting up a rival business or working for a company in competition with Credit Consultants. Instead he set up a new personal recruiting company and got as far as incorporating that in February 2007.

[26] Just before he left his employment on 22 December 2006 he gathered information from Credit Consultants which would be of use to him in his new company. For example, he made a list of clients to target for his new business. These were major clients with whom he had established a close relationship. He sent a number of e-mails from Credit Consultants to his own home e-mail address. These e-mails comprised:

1. Client contact report (National) in xls format – a list of names and contact details of all of the company's clients other than those whose business is managed out of Auckland.
2. Client contact report (full detailed version) in xls format – a full list of all the names, employee names, contact details, position titles, and other information for all of the company's clients other than those whose business is managed out of Auckland; and
3. An e-mail from an employee of New Zealand Post setting out details of a potential new stream of work for Credit Consultants from New Zealand Post.

[27] During the same period Mr Wilson also e-mailed the following documents from his work to Mr Lovell, his brother-in-law:

1. Client contact reports in xls and pdf format;
2. Client contact reports (full detailed version) in xls and pdf format;
3. Resume of Dave Wilson in xls and pdf format;

4. Performance planning and assessment, employee input form – as developed and used for assessing the company's employees;
5. Performance appraisal outline as developed and used for appraising the company's employees; and
6. The company's bonus policy as developed and used as a bonus system for the company's employees.

[28] The reason he gave for doing this was that his own computer could not open the attachments so he sent them to his brother-in-law to see if he could open them.

[29] Mr Lovell was subpoenaed by the plaintiff to give evidence. He acknowledged that his computer received the e-mails but denied having seen the attachments. He said he had no idea why Mr Wilson was sending them to him and could not recall if he had had a conversation with Mr Wilson about them. He then forwarded the documents to Mr Wilson. Mr Lovell's evidence was guarded and defensive. He appeared to be unwilling to give evidence and protective of his brother-in-law, Mr Wilson.

[30] Whatever happened in relation to these e-mails, it was accepted by Mr Wilson that they contained confidential information and that in sending them without permission from Ms Hyett he was in breach of his employment agreement.

[31] When he left, Mr Wilson also took all of his business cards from Credit Consultants. These contained personal details of all existing and prospective clients he had dealt with. When Ms Hyett discovered this in early 2007 she contacted him. He told her he would return them but this was not done until an interim order was made by Judge Travis.

Employment with EC Credit Control Ltd

[32] On 1 February 2007 Mr Harrison, the managing director of EC Credit Control Ltd, found out from a representative of a client which his company shared with Credit Consultants that Mr Wilson had been made redundant. He approached him and, after an interview, he offered him the position of New Zealand corporate

sales manager for EC Credit Control, a stand alone position which oversees the entire New Zealand corporate market and operations for EC Credit Control.

[33] EC Credit Control was started in 1989 as a provincial company and has since expanded to operate in 8 cities from Whangarei to Dunedin. It is in the same business of debt collection as Credit Consultants and is a direct competitor with it. As well as debt recovery, it also provides its clients with two other services: drafting terms of trade and providing employment agreements.

[34] Mr Wilson entered into an individual employment agreement with EC Credit Control on 12 February 2007. That agreement includes a confidentiality clause and a restraint of trade clause. The latter provides for a term of restraint for 18 months after termination of the employment agreement for any reason other than unjustifiable dismissal or redundancy.

[35] As corporate sales manager for EC Credit Control, Mr Wilson's key tasks included reporting on the details of clients he had called on or was in regular contact with; actively seeking out, obtaining, and establishing new corporate, national, and multi-branch accounts; and to actively promote an increase in sales and ensure customer retention. I am satisfied that in many ways it resembles his role with Credit Consultants.

[36] Mr Wilson said that in his initial discussions with Mr Harrison he raised the issue of the restraint of trade clause in his contract with Credit Consultants. He told Mr Harrison that his role had been made redundant and that after talking to human resources practitioners the fact that he had been made redundant probably meant that the restraint of trade did not have any effect. He took no legal advice on this and did not show the HR practitioners his restraint clause.

[37] It is common practice in EC Credit Control to have restraint of trade clauses. Mr Harrison said he believed that because Mr Wilson had been made redundant it was not unfair for him to have solicited Mr Wilson although he had not taken legal advice to that effect and had not seen the Credit Consultants employment agreement before employing him. He agreed that one of the advantages of having an employee

like Mr Wilson was his extensive knowledge of the business of Credit Consultants Debt Services and its clients as well as in-depth knowledge of the pricing structures. He wasn't concerned about Mr Wilson's restraint of trade.

[38] On 24 February 2007 the second defendant advertised Mr Wilson's employment with it in the Dominion Post. The advertisement said that for the past 5 years Mr Wilson had been general manager – Central and Southern Region – for Credit Consultants Group NZ Ltd which also operated in the credit management industry. It referred to his wealth of experience and contacts which would be invaluable for the continuing growth of EC Credit Control's business. When that came to Ms Hyett's attention she began these proceedings.

[39] In the first 2 or so weeks of his employment with EC Credit Control, Mr Wilson visited at least ten former clients of Credit Consultants. Mr Harrison was aware of this and personally followed up on some of them. Mr Wilson sent out contract documents to two or three of these clients and secured at least one former client of Credit Consultants for EC Credit Control. Ms Hyett was told by one client that he had been approached by Mr Wilson who was seeking to have them place their debt recovery with EC Credit Control.

[40] On 5 March 2007, Mr Wilson received a letter from the solicitors for Credit Consultants alleging that he was in breach of his restraint of trade and other provisions in his employment agreement and putting him on notice that the company had decided to file proceedings against him relating to breaches of his employment agreement.

[41] Although Mr Wilson maintained initially that once he received this notice he took no further steps that would have been in breach of his restraint of trade obligations, cross-examination revealed that he continued to send out some contracts on behalf of EC Credit Control to former Credit Consultants clients. On 8 March 2007 he sent a letter of solicitation to the Upper Hutt City Council, an organisation he knew to be a prospective client of Credit Consultants.

[42] As well, it is probable that he used his knowledge to try and undercut Credit Consultants on their pricing in at least one case. He said that he was only offering a discount on pricing to a client who would bring in a large amount of business but, given that he had intimate knowledge of Credit Consultants' pricing structures, I find that he was able to use this to create a pricing advantage for a potentially very lucrative client for EC Credit Control.

[43] In summary, Mr Wilson admitted:

- He took employment with a company that was in the same business as Credit Consultants within the 6-month restraint period.
- He had used confidential information from Credit Consultants in the form of business cards, client lists, and other documents which he had sent by e-mail before his employment terminated or received after.
- He had solicited both existing clients and at least one prospective client of Credit Consultants with a view to moving their business to EC Credit Control within the 6-month period.

[44] All of these are *prima facie* in breach of his employment agreement with Credit Consultants however the issue that was in most contention was whether the restraint of trade clause was reasonable in all the circumstances and therefore enforceable against him.

Restraint of trade clause

[45] 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 has reiterated some of those principles in the context of employment law [3]:

- 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 interests of the former employer and in the public interest[4].

[3] *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490
[4] At p495

- The reasonableness of the restraint clause is to be determined at the time the contract was entered into[5].
- 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[6]

[46] Other principles relevant to this case can be extracted from Employment Court cases such as *Airgas Compressor Specialists v Bryant*[7]:

- Proprietary interests to be protected include trade secrets, confidential information, and business or trade connections.
- Measures of reasonableness can be the duration, the geographical ambit, and the scope of the term.
- The public interest requires that the right of every person to trade and be freely employed is only limited by a restraint that is reasonable.
- 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 employer.[8]

[47] In challenging the reasonableness of the clause 7 restraint of trade provision, Mr Tayler, for the defendants, relied on:

(a) The geographical restrictions.

(b) The term of the restraint.

(c) The restriction on working for an opposition company.

(d) Public interest.

---

[5] At p496
[6] *Fuel Espresso Ltd v Hsieh* unreported, Court of Appeal, 9 March 2007, CA88/07, [2007] NZCA 58
[7] [1998] 2 ERNZ 42
[8] *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617 (CA)

(a) Geographical limits

[48] Mr Tayler submitted that there is a question mark over whether the plaintiff company actually runs a business in Auckland because Mr Lintott was originally employed by a different company from the plaintiff. This is a question of fact. I find on the evidence that Credit Consultants Debt Services (NZ) Ltd does do business in Auckland and it is run by Mr Lintott.

[49] I also find that although Mr Wilson had limited direct contact with clients in the Auckland region he was aware of the identity of at least the major clients in the area and was very familiar with the way in which Credit Consultants approached and nurtured its Auckland clients as well as the pricing structures offered to them.

[50] Mr Tayler challenged the proposition that the reasonableness of a restraint of trade is assessed as at the time the employment agreement is entered into. This was chiefly to undermine the reasonableness of the clause restricting Mr Wilson from working in the South Island.

[51] The settled law does not assist that submission and in any event the evidence established that, from the time the employment agreement was entered into until the present, Credit Consultants has had a presence in the South Island and Mr Wilson was responsible for and familiar with clients there throughout his employment.

[52] In *Debtor Management (NZ) Ltd v Quail*[9], Colgan J found that the same geographic restriction in relation to a similar debt collection business was reasonable given that in that case the Auckland based company had customers who in turn had debtors who were spread throughout New Zealand. For the same reasons I find that in terms of geography the restraint of trade is reasonable.

[9] [1993] 2 ERNZ 498 at 508

(b) Term of restraint

[53] I also find that the duration of 6 months of the restraint is reasonable. It does not prevent Mr Wilson's employment in a company that is not involved in the same or substantially the same business in New Zealand and therefore is not a complete prohibition on his employment. To the extent that it restricts Mr Wilson's freedom to take up employment, I find that it is reasonable given the quality and extent of proprietary information belonging to Credit Consultants that was in his command when his employment with the company ended. The reason for the restraint of trade was to protect that information from potential misuse.

[54] Mr Wilson did not challenge the term when he entered into it and has taken no exception to the 18-month restraint of trade provision which is in his employment agreement with EC Credit Control. He attempted to justify that on the basis that his new restraint of trade is of no effect if he is unjustifiably dismissed or made redundant but that does not alter the fact that he has agreed to be restrained for three times the period of the Credit Consultants restraint of trade.

[55] I find Ms Hyett's reasons for imposing the 6-month term of the restraint of trade to be reasonable. It was not imposed arbitrarily but after legal advice and in the light of her own direct experience and for the purpose of protecting the company's proprietary interests including, but not limited to, its client lists and agreements.

(c) Restriction on employment

[56] Mr Tayler next submitted that, while Mr Wilson might reasonably be stopped from working for an opposition company in the debt recovery business, he should not be restricted from working in either of the other two services provided by EC Credit Control in addition to debt recovery. He argued that to the extent that the restraint as drafted prevents Mr Wilson from working in any part of EC Credit

Control whether it concerns debt recovery or not it is unreasonable and invited the Court to consider modifying the clause.

[57] For the plaintiff, Mr Taylor submitted that EC Credit Control's provision of terms of trade to its clients was very close to its work in debt recovery. Those terms of trade include penalty payments imposed on debtors to meet the costs of debt recovery. Also the work on employment contracts would bring Mr Wilson into contact with clients or potential clients of Credit Consultants which would potentially enable him to misuse confidential information. In his submission any modification of the clause to limit the extent of his work for EC Credit Control would be unenforceable.

[58] The test to be applied is whether the restriction on Mr Wilson from working for an opposition company in the same or substantially the same business is reasonable.

[59] I find for reasons given earlier that it is reasonable because it is justified by the plaintiff's need to protect its proprietary interests. It does so by restraining Mr Wilson from working for a company that is involved in substantially the same business. I find that because they are closely related to EC Credit Control's client base the work of providing terms of trade and even employment contracts is substantially the same business. No modification is necessary to make the restraint of trade clause reasonable.

(d) Public interest

[60] Mr Tayler also sought to argue that it is not in the public interest for clauses like clause 7 to be enforceable because it may prevent employees in the future from taking risks by putting restraint of trade clauses to the test.

[61] The public interest affected by restraint of trade covenants is described in the following terms in Law of Contracts in New Zealand[10]:

[10] Burrows, Finn & Todd (3rd ed, 2007) at p421

> *The market for goods and services on which the economy depends should not be distorted by unreasonable diminution of consumer choice arising from private restrictions on persons willing to offer in that market their goods or services.*

[62] The public interest is therefore about the impact of the restraint of trade on the wider public market rather than on the private rights of individuals who are governed by the restraint. In all cases where parties are bound by contracts or agreements it is up to the parties themselves to calculate the extent to which their actions are curtailed by the terms of the contract. This is a private not a public interest. It is also the case that the public interest in the administration of justice is not served by not enforcing rational agreements between individuals.

[63] I find that the plaintiff company has established that the terms of the restraint of trade clause were reasonably necessary to the parties in order to protect the proprietary interests of the plaintiff and they do not offend against the public interest.

[64] I find that Mr Wilson has breached the clause 7 restraint of trade clause by commencing and continuing employment with EC Credit Control and contacting Credit Consultants clients in order to solicit, endeavour to entice away, or discourage any client of Credit Consultants from remaining as one of their clients.

Confidentiality clause

[65] There was no challenge to the enforceability of this clause by the defendants although Mr Tayler made the point that when Mr Wilson downloaded the client lists and other materials he did not intend to use that information to compete with his former employer or use it to their detriment but to start his own business in a different field. He asked the Court to take this into account when determining the severity of the breach if one were found.

[66] I have no hesitation in finding a breach of the confidentiality clause. The materials e-mailed and taken by Mr Wilson were clearly in the realm of confidential information as was the reconstructed client list he made and used in his employment at EC Credit Control.

[67] Clause 25 of the agreement does not limit the prohibition on publication of confidential information to competing businesses but prohibits the employee from using such information for any purpose other than discharging duties under his employment contract with Credit Consultants.

[68] I find that Mr Wilson breached the confidentiality provisions in clause 25 by using confidential information without obtaining the consent of Ms Hyett when he sent such information to Mr Lovell's e-mail address for the purpose of using it to his advantage in his new business and by taking the business cards which he had accumulated in the course of his employment.

[69] I am sceptical of the claims that there was an innocent purpose in all of these activities. The e-mails were sent to Mr Lovell under cover of subject heading and e-mails which did not properly describe the contents such as "cover letter" and "CV" and Mr Wilson did not return the business cards he wrongly took even when asked by Ms Hyett.

[70] Importantly, although the original intention may not have been to use the confidential information for a competitor company, eventually that is what it was used for. Mr Wilson had no compunction in recreating a client list and specifically using it to solicit clients of Credit Consultants for EC Credit Control thereby giving that company an undue advantage.

Non-solicitation clause

[71] Again, the enforceability of this clause was not challenged. For reasons relating to the restraint of trade clause I find that all of its terms are reasonable. The prohibition on soliciting existing and prospective clients is for a period of 6 months imposed to protect the proprietary interests of Credit Consultants. It was agreed to by Mr Wilson at the time he accepted his employment and there was no argument that his terms of employment were valuable and legal consideration for the non-solicitation restraint.

[72] The evidence clearly establishes that Mr Wilson actively solicited Credit Consultants' clients including at least one organisation which he knew was a

prospective client of Credit Consultants. He has therefore breached clause 31 of his employment agreement.

Claim against the second defendant

[73] It was accepted by the plaintiff that the Employment Court does not have jurisdiction to hear a claim for damages against the second defendant for a breach of an employment agreement between Credit Consultants and Mr Wilson[11].

[74] The plaintiff however seeks a penalty against the second defendant pursuant to s134(2) of the Employment Relations Act 2000. It provides:

> *Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[75] To warrant the imposition of a penalty under s134(2) of the Employment Relations Act 2000, the plaintiff must establish that there was an act of incitement, instigation, aiding, or abetting and that this act was wilful.

[76] There is no direct authority which establishes the particular knowledge of intent that is required to be proven against an alleged party to a breach of contract. Mr Taylor drew an analogy with the tort of interference with contractual relations which requires that the defendant must have known of the contract and deliberately intended to interfere with it[12] although that knowledge need not be of the exact terms of the contract. It is sufficient if the defendant knew of the general contractual situation or practice in a particular field. I accept that as an appropriate standard of wilfulness for the purpose of evaluating whether a person is a party to a breach of an employment agreement.

[77] On the facts of this case, I am satisfied that Mr Harrison of EC Credit Control was quite aware of the existence of the restraint of trade clause in Mr Wilson's employment agreement and, although he had not seen it, chose to make no proper inquiry about it. He also knew that his company relied on such clauses. I find that he was reckless as to the consequences of a breach of the restraint of trade when

---

[11] *Credit Consultants Debt Services Ltd v Wilson*, unreported, full Court, 5 April 2007, WC12A/07
[12] *McIntyre v Bianchi* [1992] 3 ERNZ 1057 at 1107

faced with being able to employ Mr Wilson who had brought a significant market advantage to him as a result of his knowledge and experience accumulated while working for Credit Consultants.

[78] The matters which EC Credit Control is said to have been party to are the employment of Mr Wilson by an opposition company; proclaiming this employment to a market which included clients or potential clients of Credit Consultants; allowing Mr Wilson to use the confidential information belonging to Credit Consultants; and allowing him to solicit clients or prospective clients of Credit Consultants.

[79] I find that, in spite of his knowledge of the restraint of trade clause, Mr Harrison took active steps to intentionally employ Mr Wilson in his opposition company. There is also direct evidence that he was aware of and took no steps to stop the deliberate solicitation of Credit Consultants' clients. The advertisement was an express assistance to that solicitation. Although it is possible that he knew of and encouraged the use of client confidential information that Mr Wilson had at his disposal, there is no direct evidence of this.

[80] I find therefore that by the actions of its managing director, Mr Harrison, EC Credit Control aided and abetted two breaches of Mr Wilson's employment agreement: employment by an opposition company and solicitation of Credit Consultants clients and potential clients.

Remedies

[81] In support of the plaintiff's application for permanent injunctions, Mr Taylor cited Travis J in *Ravensdown Corp Ltd Groves*[13]

> *Permanent injunctions, being equitable remedies, are discretionary. If there is a proven breach of duty and a threat of further damage, a permanent injunction may be the appropriate remedy. Permanent injunctions have frequently been used to enforce negative contractual obligations, such as reasonable restraints of trade which are necessary to protect proprietary interests. … The Court will consider whether damages are an adequate remedy and whether there are any factors which preclude the grant of equitable relief such as delay or acquiescence or lack of "clean hands" on the part of the plaintiff.*

[13] [1998] 3 ERNZ 947 at 968

[82] In the present case the restraint of trade subsists until 22 June 2007 and the plaintiff seeks protection by say of injunction until then. The question is whether an injunction is necessary to prevent the first defendant from continuing to breach this restraint and the other clauses in contention.

[83] I agree with the plaintiff that damages of themselves would not be an adequate remedy in the present case. Damages are notoriously difficult to establish in a case such as this.

[84] Mr Wilson told the Court in his brief of evidence that no contact had been made directly to any clients once he was put on notice by the plaintiff's solicitors, but that proved not to be correct. He did make further contact notwithstanding the notice. Although he has taken no steps that would amount to breach since the interim injunction orders were made, he has been since that time on garden leave and not doing any work at all.

[85] It is quite clear that before he was put on notice Mr Wilson methodically solicited the business clients of Credit Consultants. Although Mr Tayler asked the Court to consider these actions as unintentional breaches, I find that they were not. Mr Wilson was fully aware of his restraint of trade and took only casual advice about it. He then took a calculated risk in acting in breach of his employment agreement. In no sense can it be said that he comes to Court with clean hands and on the basis of his past behaviour the plaintiff is justified in having little confidence that Mr Wilson would not continue to act in breach of his contract without a permanent injunction preventing it.

[86] Taking all matters into account, I conclude that injunctions should issue until the expiry of Mr Wilson's restraint of trade on 22 June 2007. This is necessary to prevent the possibility of any other breaches of his employment contract and means that his employment must end with EC Credit Control until that date.

Compliance orders

[87] The plaintiff seeks a compliance order to ensure that Mr Wilson complies with the provisions of his employment agreement with the plaintiff. There was no

dispute about these orders although there was discussion with the parties' representatives about the possible duration of a compliance order concerning confidentiality.

[88] The obligation of confidentiality is ongoing once an employee has left his or her employment. Section 139(3) of the Employment Relations Act 2000 only requires the Court to specify the time within which an order is to be obeyed rather than the duration of the order.

[89] In addition to the other breaches established, I find that Mr Wilson acted deliberately and knowingly in breach of his employment agreement by covertly taking confidential information from his employer before he left his employment. He failed to return business cards when requested.

[90] The plaintiff has established that a compliance order is necessary in this case.

Penalties

[91] Mr Taylor submitted that each breach of the employment agreement should be marked by a penalty. Not only does that mean a penalty should be imposed for each of the causes of action but for the individual acts within each cause of action. For example, he says that there is evidence of at least ten separate acts of solicitation and that each separate e-mail sent by Mr Wilson containing confidential information amounts to a separate act of breach of confidentiality. In his submission, only the breach of restraint of trade could be treated as a breach of a continuing obligation and therefore only capable of one penalty.

[92] I accept Mr Tayler's argument that the penalty breaches should be dealt with globally. This is a situation where the breaches are either repetitive (soliciting clients) or arise out of a single course of conduct (sending the e-mails). That approach was taken by Goddard CJ in *Xu v McIntosh*[14]. I also have regard to the totality principle referred to by Palmer J in *NZ Baking Trades IUOW v Quik Bake Products Ltd (in receivership) & Cormack*[15].

[14] [2004] 2 ERNZ 448 at 463
[15] [1990] 2 NZILR 284 at 290

Penalty against first defendant

[93] The maximum penalty against an individual under s135(2) is $5,000. Penalty payments are to be paid into the Crown bank account unless the Court orders that the whole or any part of it is paid to any person.

[94] The three causes of action which have been made out relate to three separate acts or series of transactions. In setting the penalty I take into account the wilfulness of the first defendant.

- He took up employment with an opposition company knowing that he was expressly prohibited from doing so by clause 7.
- He deliberately e-mailed confidential information from the plaintiff company in a covert manner and has accepted that this was wrong.
- Having obtained employment with the second defendant, he enthusiastically set about soliciting clients and potential clients of the first defendant knowing that he was prohibited from doing so by clause 31.

[95] Each of these warrants a penalty to mark the seriousness of the actions of the first defendant. I am not in a position to link the breaches to any harm caused to the plaintiff as that is a matter yet to be determined.

[96] In all the circumstances, a penalty of $2,000 for each of the global breaches is imposed making a total of $6,000.

Penalty against second defendant

[97] The maximum penalty that may be imposed against a company is $10,000. Again there are multiple breaches for which a penalty could be imposed. These include the employment of the first defendant, the advertising of his employment, and allowing the first defendant to solicit clients for the second defendant's benefit.

[98] In setting a penalty against the second defendant I take into account the fact that on the one hand the company was a party to the breaches rather than the principal but on the other that the company was the entity most likely to benefit from

the breaches. It had obtained the services of an employee who, if unrestrained by the terms of his agreement, would likely have been able to attract significant new clients and give the company an advantage in tendering for new and major work.

[99] As the company's representative, Mr Harrison acted recklessly and to the company's potential advantage. The penalty will reflect that.

[100] I treat the second defendant's involvement in the employment and advertising as one global breach and in the soliciting as the other. For each of these breaches the company is ordered to pay $2,500 making a total penalty of $5,000.

Application of penalties

[101] Mr Taylor asked that any amount ordered as a penalty should be paid to the plaintiff who has no other satisfactory recourse against the first defendant to recover what has been lost as a result of Mr Wilson's action. In particular the plaintiff has no other recourse against the second defendant in the Employment Court and taking separate proceedings in the High Court would be a very expensive exercise. That submission was not responded to by Mr Tayler.

[102] This is a case where it is appropriate that the full amount of the penalties imposed against both defendants is to be paid to the plaintiff because the breaches in this case were not breaches of a statutory obligation such as payment of wages or holiday pay but a matter solely between the parties. Unlike proceedings for a personal grievance there are no statutory remedies to compensate a successful plaintiff in an application for injunction except for a damages claim.

Damages

[103] The question of damages is to be the subject of a further hearing. Before that hearing a phone conference will be held with the parties to determine the date and ambit of that hearing.

Non-publication

[104] During the trial there was reference to commercially sensitive information in the oral evidence given and a considerable amount of documentation of a confidential nature. The parties' representatives agreed that a non-publication order to protect these matters from publication would be appropriate.

Orders

1. Injunctions will issue to restrain the first defendant until 22 June 2007 from:

   (a) Working for any opposition company of the plaintiff that is involved in the same or substantially the same business within New Zealand, including the second defendant;

   (b) Setting up or operating a business in competition with the plaintiff's business within New Zealand;

   (c) Soliciting, endeavouring to entice away or discourage any client of the plaintiff from remaining a client of the plaintiff; and

   (d) Soliciting, endeavouring to entice away from or discouraging from being employed by the plaintiff, any employee or actual client/customer or prospective client/customer of the plaintiff.

2. I order that the first defendant complies with the provisions of his employment agreement with the plaintiff in terms of clause 7, clause 25, and clause 31. This order is to be obeyed upon receipt of this judgment by the first defendant.

3. The first defendant is to pay a total of $6,000 in penalties.

4. The second defendant is to pay a total of $5,000 in penalties.

5. Each of the penalties is to be paid to the plaintiff company.

6. There is to be no publication of any of the documentation in evidence in these proceedings without leave of the Court. Leave

will not be granted if either party objects on the basis that the documentation is confidential or commercially sensitive.

Costs

[105] Costs are reserved until the question of damages has been resolved.

C M Shaw
JUDGE

Judgment signed at 11.30am on 1 May 2007