

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 40/08  
5104645

BETWEEN

**MARLBOROUGH  
MORTGAGES LIMITED  
T/A MIKE PERO  
MORTGAGES -  
MARLBOROUGH**  
Applicant

AND

**TRINA MARIE NICHOLS**  
Respondent

Member of Authority: Helen Doyle

Representatives: William Yates, Counsel for Applicant  
Mike Turner, Counsel for Respondent

Investigation Meeting: Blenheim on 12 March 2008

Determination: 14 April 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant is Marlborough Mortgages Limited which is a duly incorporated company having its registered office in Blenheim and carrying on a mortgage brokering business in the Marlborough area.

[2] William Yates and his wife Janet Yates are directors of the company which trades as Mike Pero Mortgages – Marlborough. Mr Yates is the franchise owner of Mike Pero Mortgages – Marlborough and the mortgage manager of the business.

[3] I shall refer to the applicant from hereon as the company or Marlborough Mortgages.

[4] Marlborough Mortgages employed the respondent, Trina Nichols, between 11 September 2006 and 9 November 2007 as a personal assistant/office manager.

[5] Ms Nichols was party to an individual employment agreement (the agreement) with Marlborough Mortgages. The agreement contained a confidentiality clause in Clause 9 and covenants of restraint of trade in Clause 10.

[6] Ms Nichols advised Mr Yates that she intended to resign from her employment with Marlborough Mortgages in or about late October 2007. Her resignation was effective from 9 November 2007. Ms Nichols was placed on garden leave for part of the notice period.

[7] After 9 November 2007 Ms Nichols went to work as a banking consultant with the National Bank in Blenheim.

[8] The company say that the restraint of trade clause in the agreement is valid and enforceable. It seeks an order that Ms Nichols comply with the restraint of trade provisions in Clause 10 of her agreement and cease working with the National Bank for the balance of the restraint period. A penalty for breach of the agreement is also sought as is a penalty for an alleged breach by Ms Nichols of her fiduciary duties. Ms Nichols was not in a fiduciary relationship with Marlborough Mortgages but I have considered whether there was any breach of fidelity and/or good faith on her part.

[9] Ms Nichols says by way of reply that working for the National Bank does not constitute a breach of the restraint of trade provision in the agreement or alternatively, the restraint of trade provision is unenforceable because it is unreasonable. Ms Nichols says that the company is not entitled to the remedies it is claiming.

### **The progress of the matter**

[10] The application was brought to my attention after it was lodged by the company in November 2007. I asked an Authority support officer to telephone Mr Yates to clarify whether he was seeking or wanting to seek interim relief. It was clear as a result of that telephone conversation that the company was seeking a compliance order and not an interim injunction. The Authority was not in a position to give the application urgency but was in a position to give it priority.

[11] A telephone conference was held with the Authority, Mr Yates and Mr Turner on 12 December 2007. Two dates were discussed for an investigation meeting being 3 and 26 February 2008. Whilst the earlier date suited Mr Yates, Mr Turner confirmed that the 26 February 2008 was suitable.

[12] On 12 February 2008 Mr Turner sent a letter to the Authority advising that he had not received as timetabled a statement of evidence from Mr Yates. Mr Turner said in his letter that he had not been able to prepare statements in response and therefore the meeting scheduled for 26 February 2008 would have to be adjourned.

[13] Mr Yates had lodged his statement of evidence with the Authority in accordance with the timetable set but did not serve Mr Turner. I accept Mr Yates did not appreciate what was required by the words *lodge and serve the statement of evidence* in the notice of directions. I asked the support officer to immediately forward to Mr Turner a copy of Mr Yates statement of evidence lodged with the Authority. Mr Turner was still of the view that an adjournment was necessary. This was on the basis that he had trial commitments, Ms Nicols was away and therefore he could not prepare a statement of evidence.

[14] I held a further telephone conference with the parties and expressed my concern to Mr Turner that he had not advised the Authority earlier that he had not received Mr Yates statement of evidence. In the circumstances an adjournment was granted and I advised the parties that the matter would be investigated on 12 March 2008 as I was in Blenheim investigating another matter that week.

### **The issues for determination**

[15] The issues for the Authority to determine are:

- What does the restraint provision in the agreement provide and does it apply to Ms Nichols in terms of her employment with the National Bank?
- Is the restraint of trade enforceable? Restraints of trade are prima facie unlawful. This is because they curtail an employee from having the freedom to work and they reduce competition. A restraint of trade will be enforced if it is reasonable in all the circumstances between the parties for protection of proprietary interests and is not in conflict with the wider public interests.
- Was there a breach of Ms Nichols' duty of good faith and fidelity to Marlborough Mortgages?

- Remedies.

### **Confidentiality and restraint provisions**

#### ***The commencement of Ms Nichols' employment with Marlborough Mortgages***

[16] Ms Nichols had spent most of her working life, about 20 years, with the Bank of New Zealand (BNZ) progressing through from a junior to, eventually, a bank manager position. Ms Nichols left the BNZ in early 2005 and shifted with her husband and children to Blenheim. Ms Nichols and her husband purchased a farm property in Blenheim in 2005 and they have a significant mortgage liability.

[17] Ms Nichols worked in a café business with her mother in Blenheim initially but decided in or about September 2006 that she needed to look for more lucrative employment in light of the financial commitments with the farm.

[18] Ms Nichols initially approached Mrs Yates, who was working in a pharmacy, and inquired whether there were any positions in the pharmacy. Ms Nichols said that she also applied at that time for other positions in Blenheim including one at PSIS as a manager.

[19] Mr Yates then talked to Ms Nichols about the possibility of a position at Marlborough Mortgages. Ms Nichols was subsequently offered the position of office manager/personal assistant.

[20] Mr Yates said that Ms Nichols made it clear to him and to his wife that she would never go back to the banking industry and he said that they relied on that statement in offering Ms Nichols employment.

[21] Ms Nichols said that any statement that she made was limited to the BNZ.

[22] I accept that Mr and Mrs Yates probably concluded that Ms Nichols was referring to the banking industry in the wider sense and not simply to BNZ. I am not satisfied that Ms Nichols understood at the time of the conversation the importance that Mr and Mrs Yates placed on the statement she had made about the banking industry. I also think it likely that Ms Nichols was only intending to refer to the BNZ because the BNZ was the only bank she had ever worked for and she had applied at or about the same time that she was approached by Mr Yates for a position with PSIS.

[23] There were a number of representations set out in the agreement with respect to qualifications, experience and medical information. Whether or not Ms Nichols would ever return to the banking industry was not set out in the agreement as a representation relied on by the company or the franchisee in offering Ms Nichol employment.

[24] Ultimately, whilst acknowledging that this was an important matter to Mr Yates, I do not find that anything significant turns on it.

***Negotiation of the individual employment agreement***

[25] Mr Yates said that not all personal assistants/office managers employed by franchisees under the Mike Pero franchise arrangement have a restraint of trade provision in their employment agreements. Mr Yates said that there was a difference between the cities and the provincial areas in terms of the necessity for a restraint of trade clause for personal assistants. Mr Yates said it was necessary in the provincial areas to protect the territory. I was provided with a statement and telephoned during the investigation meeting another Mike Pero franchisee who had a restraint of trade clause for an administrative assistant.

[26] There was negotiation about Ms Nichols hours and her rate of pay. I find that the individual employment agreement was provided to Ms Nichols in all likelihood on the first day of her employment. She signed it that same day and acknowledged amongst other matters in doing so that she had been advised she could seek independent advice, had a reasonable opportunity to seek the advice and that she knew the agreement could be taken away.

[27] The individual employment agreement provided that Ms Nichols be paid \$15 per hour, be subject to a trial period of three months and work between the hours of 8.30am to 5pm Monday to Friday. There was a job description attached to the individual employment agreement which set out Ms Nichols primary responsibilities.

[28] Clause 9 of the individual employment agreement contained a confidentiality clause that applied to all information both recorded and memorised. Clause 9.3 of the agreement provided the restrictions in terms of confidential information applied through the term of the contract and after termination of the contract without any limit in point of time.

[29] Ms Nichols said that she did not remove any confidential information including customer lists belonging to Marlborough Mortgages and Mr Yates accepted that he had no evidence to establish otherwise.

[30] After Ms Nichols had commenced her employment with the National Bank Mr Yates had a discussion with the branch manager of the Blenheim National Bank. An arrangement was reached that Ms Nichols would not have dealings with existing clients of Marlborough Mortgages nor with any new clients referred to the National Bank from Marlborough Mortgages. I heard evidence about one client. I accept that the client was inadvertently referred to Ms Nichols because of the unavailability of the other banking consultant. In any event Ms Nichols did not end up seeing the client. I will return to this arrangement reached as a result of discussions between Mr Yates and the National Bank in Blenheim and Ms Nichols. It is relevant in terms of clause 10.2 of Ms Nichols employment agreement which prohibits solicitation of clients.

***Restraint of trade***

[31] Clause 10.1 and 10.2 contains the following covenants of restraint of trade:

*10.1 The employee covenants that they will not, either during the term of this contract or for a period of six (6) months after the termination of this contract (for whatever reason) be employed, engaged, concerned or interested directly or indirectly, either alone or in partnership, in any capacity (whether as manager, servant, director or shareholder except as shareholder in a public listed company) in any business offering to provide any of the same or similar services as the mortgage consultancy services provided by the employee to the Company during the term of the contract. This includes without limitation, marketing, promotional work, consultancy or approval of loans for any lending institution.*

*10.2 The employee covenants that they will not for a period of six (6) months from the date of termination of this contract (for whatsoever reason), directly or indirectly solicit, accept or in any way establish or engage in business or businesses for the provision of any type of mortgage services with the following:*

- *Any person, firm or company who or which at the date of the termination of this contract was a former client of the Company or the Franchisor.*
- *Any person, firm or company who or which at the date of the termination of this contract is an existing client of the Company or the Franchisor.*
- *Any person, firm or company to whom the employee has provided any services in accordance with this contract or under any earlier contract between the Company and the employee.*

[32] Clause 10.3 provided that the covenants as set out in sub clauses 10.1 and 10.2 shall apply within the Marlborough District. Clause 10.4 provided that the employee acknowledges the restraints are reasonable as to periods, territorial limitation and subject matter. The reference to clause 8 in that sub clause is clearly an error. In Clause 10.6 the employee acknowledges that the covenants given in Clause 10 are for the benefit of both the company and the franchisor, and shall be enforced by either or both of the company and the franchisor.

[33] I have considered clause 10.1 in relation to the duties that Ms Nichols performed at Marlborough Mortgages. Marlborough Mortgages provides a mortgage brokering service. Mr Yates interviews and advises clients about options with respect to applying for loans and assists in preparing loan applications and making a decision as to which lender or lenders loan applications should be forwarded to. It is common ground that Ms Nichols was not involved in client interviews to discuss loan requirements. Mr Yates undertook those loan interviews alone. Mr Yates would make the decision as to which lender or lenders he would recommend to a client and he would prepare the loan application.

[34] As part of her personal assistant role Ms Nichols worked closely with Mr Yates on a day to day basis. Her role was to type letters, track progress of loans, post mail, fax loan applications, ensure the office and communal spaces were clean, answer all incoming calls and follow up telephone contact with existing and prospect clients, liaise with banks, solicitors, valuers and insurance providers, provide clients with information and provide refreshments if necessary. In terms of any marketing, Ms Nichols would send clients gifts as discussed and authorised by Mr Yates and make appointments with Mr Yates to discuss advertising in radio and newspapers. On one occasion Ms Nichols posted out a newsletter. Ms Nichols role is properly described as administrative in nature.

[35] In her role at the National Bank Ms Nichols does work in a number of areas which are not the same or similar services that she provided to Marlborough Mortgages. Ms Nichols opens new bank accounts for customers, manages term investments, deals with credit card inquiries and such like. Ms Nichols as part of her role does prepare applications for home loans both new and "top ups" and assesses loan applications and grants approvals within the bank's guidelines. Ms Nichols was

not undertaking that same service when she was employed by Marlborough Mortgages.

[36] Mr Turner submits that Ms Nichols is not in breach of clause 10.1 because she carried out different functions for Marlborough Mortgages than she is now carrying out in her new role at the National Bank. That is because Ms Nichols was not involved in approval of loans or consultancy for Marlborough Mortgages. Mr Turner submits that on a literal reading of Clause 10.1 Ms Nichols would be restrained from taking a position as a tea person or cleaner at a bank, law firm, insurance company or finance company amongst others who give advice about and/or approve loans or organise insurance.

[37] Clause 10.1 is drafted very widely. The plain meaning of the words in the first sentence of that clause provide that Ms Nichols is restrained from taking a position in any business that provides the same or similar services as the mortgage consultancy service Ms Nichols provided to Marlborough Mortgages. The plain meaning of the words is wide enough to include some of the administrative tasks relevant to a lending application that Mr Yates asked Ms Nichols to undertake. These are tasks which Ms Nichols would continue to do as part of her new role such as requesting information from clients in order to be able to complete loan applications, making telephone calls to clients and the like.

[38] The final sentence of clause 10.1 includes the words *this includes without limitation*. I find that these words enlarge rather than provides an exhaustive meaning of the services provided by the employee to the company during the term of the contract when clause 10.1 is read as a whole. The effect of that sentence therefore is that notwithstanding Ms Nichols was not providing a service whereby she approved loans to Marlborough Mortgages, she is still restrained from taking a position where she approves loans from any lending institution.

[39] Clause 10.2 is a non-solicitation clause. Mr Yates concentrated in his evidence and closing statement on clause 10.1 because he believed that Ms Nichols should not under that clause be employed with the National Bank until after the termination of her employment for six months. Mr Turner focused likewise on clause 10.1.

[40] I want to refer to clause 10.2. Mr Yates and Ms Nichols new employer, the National Bank, reached an arrangement whereby Ms Nichols would not deal with existing customers of Marlborough Mortgages and new customers referred from Marlborough Mortgages. There is no evidence to satisfy me that Ms Nichols has solicited clients of Marlborough Mortgage in contravention of that arrangement. The various object sections of the Employment Relations Act 2000 encourage the parties to an employment relationship problem to attempt to resolve the matter between themselves without resorting to more formal processes. In the circumstances where I consider the parties have resolved any issues arising out of clause 10.2 and there are no issues with respect to non-compliance with any such arrangement reached I will not consider clause 10.2 in terms of its reasonableness.

[41] For completeness I do not find that clause 10.2 is a clause that prevents Ms Nichols working for the National Bank because she did not provide any services to the National Bank whilst employed by Marlborough Mortgages. It will be necessary to return to and consider the non-solicitation clause in 10.2 in terms of whether the covenants of restraint of trade are no wider than reasonably required.

[42] For the reasons that I have set out above I find in conclusion that the restraint of trade covenant in clause 10.1 is very wide, covers the termination of the employment contract for any reason and does apply to Ms Nichols in her position with the National Bank.

***Is the restraint of trade provision reasonable?***

[43] Mr Yates understood prior to the investigation meeting that I would need to understand what was relied on terms of what the proprietary rights with respect to trade secrets, trade connections or confidential information Marlborough Mortgages was seeking to protect. I was particularly aware in this matter that Mr Yates did not have any legal assistance at the time of the investigation meeting, although he said that he had obtained some legal advice at an earlier stage.

[44] Mr Yates referred to the Mike Pero systems and processes in terms of trade secrets, confidential information about the systems and processes and about clients and trade connections in terms of clients.

[45] There was some discussion with Ms Nichols during her employment about the possibility of becoming a loan writer and there was also a discussion about reverse

equity options. Ms Nichols role with Marlborough Mortgages never went beyond that role which was described in the job description attached to the agreement as a personal assistant/office manager.

[46] Ms Nichols accepted that she worked closely with Mr Yates and that the environment in the office was inter-active. Mr Yates would talk about clients and loan applications with Ms Nichols.

[47] The reasonableness of the protection afforded by a restraint of trade covenant is generally to be determined at the time it was entered into. Reasonableness however can be assessed on the basis of what occurred during the course of employment - *The Broadcasting Corporation of New Zealand v. Nielsen* (1988) 2 NZELC 96, 040.

[48] Mr Yates said that Ms Nichols assessed all the processes and systems of his business which are provided to franchisees at training on receipt of the franchise fee.

[49] The Mike Pero system and processes consisted of manuals which are contained in binders and were in the office and the Mike Pero Mortgages computer system OSL which was stored on Mr Yates' laptop. Ms Nichols did not accept that she had access to all the processes and systems of the Mike Pero Mortgage business. She accepted that she had seen and used some of the processes set out in the binders and had typed letters as instructed, some of which Mr Yates had modified for his business. Ms Nichols said that she did access on occasions the OSL computer system but I accept that was only to update client data for Mr Yates and she was accessing that system as part of her administrative role.

[50] Ms Nicols did not receive specific Mike Pero training on the computer software or systems. She did not attend any Mike Pero conferences. Mr Yates relied on the High Court decision of *Mike Pero (New Zealand) Ltd and Freedom Business Developments Limited v Exact Solutions Limited and Stephen Webb* 17 April 2007, CIV 2007-442-66. Justice Miller had granted in that case an interim injunction restraining Mr Webb and Exact Solutions Limited from carrying on business as mortgage brokers within 15k of the second plaintiff' business in Nelson. In that case Mr Webb had been engaged by the second plaintiff as a loan writer with a Mike Pero franchisee in Nelson. It is clear from the judgment that Mr Webb attended a five day Mike Pero training course during which he gained knowledge of the business model

and customers of the second plaintiff. Mr Webb then took up another opportunity with a mortgage brokering firm.

[51] That situation in my view is capable of being distinguished from that of Ms Nicols. Ms Nicols was not employed by Marlborough Mortgages as a loan writer but in an administrative role. Ms Nicols did not undergo the training that Mr Webb did and she did not interview clients, prepare loan applications or make any decisions about to whom the loan application should be sent.

[52] Mr Yates could not advise me specifically what was unique to the Mike Pero systems and processes, apart from the sort of general knowledge that Ms Nicols would have obtained about Mr Yates' business in order to perform her administrative and office functions. This is the sort of general knowledge which the company cannot gain protection for.

[53] The only two matters that Mr Yates could specifically refer to was the timing of letters that were sent as part of the process or system, and the reward system. I am not satisfied that Mr Yates can be said to have possessed a proprietary interest in those two matters in the nature of trade secrets.

[54] My questioning of Mr Yates established that the main concern for Marlborough Mortgages was that clients may be enticed away from the company in what is a competitive industry to a competitor such as a bank or other lending institution.

[55] Influence over customers may well give rise to a reasonable restraint. In this employment relationship however Mr Yates was the only person undertaking the interviewing of and making the decisions for, clients of Marlborough Mortgages in terms of their loan applications. Ms Nichols would in that situation be regarded by clients as having an administrative role only and therefore under the direction and control of Mr Yates.

[56] That is a quite different situation from one where the employee is in the position of dealing with customers directly and personally without employer involvement. A customer of Marlborough Mortgages was not relying on Ms Nichols skill and judgment in terms of any advice as to loans, but on Mr Yates skill and judgment. Ms Nichols involvement was in terms of a personal assistant who worked

between Mr Yates and the client. Ms Nichols did not have her own clients. I find that Ms Nichols influence over clients was minimal.

[57] The evidence that I heard supported there is no general industry practice as such in terms of restraints of trade for administrative employees with mortgage brokering organisations. Ms Nichols was not subject to a restraint of trade in her employment with the National Bank and had not been with the BNZ.

[58] The protection afforded to Marlborough Mortgages should be no more than adequate. The restraint of trade covenant in Clause 10.1 is drafted so widely that it impacts in a significant way on Ms Nichols ability to find work in an area in which she worked for 20 years. Ms Nichols is subject to a confidentiality clause that survives the termination of her employment and an arrangement has been reached about Ms Nichols not dealing with Marlborough Mortgages existing or new clients whilst employed by the National Bank.

[59] In conclusion I do not find that Marlborough Mortgages has satisfied me that the covenant of restraint of trade in clause 10.1 is reasonable for the protection of its proprietary interests. There is adequate protection by virtue of the confidentiality clause 9 and the arrangement reached with the National Bank about Marlborough Mortgage clients. In those circumstances I do not find that the restraint of trade covenant in clause 10.1 is reasonable.

[60] Having found that the restraint of trade clause is unreasonable, the Authority may under s.162 of the Employment Relations Act 2000, subject to s.163 and s.164 make any order that the High or District Court may make under the Illegal Contracts Act 1970.

[61] Under s.8 of the Illegal Contracts Act 1970 the Court may modify the provision.

[62] I am not persuaded to exercise my discretion and modify clause 10.1. The restraint of trade provision in my view was not reasonable at the time that it was entered into given that Ms Nicols role was in an administrative role and she was not going to have any influential contact with Marlborough Mortgages clients in that role.

**Determination**

[63] I find the restraint of trade provision in clause 10.1 of the agreement is unenforceable. In the circumstances I make no order for compliance or award a penalty for any breach.

[64] In terms of the duty of fidelity and good faith Mr Yates was disappointed that Ms Nichols simply told him during her notice period that she had changed her mind about her obligations under clause 10.1. Ms Nichols did not recall using this turn of phrase but I appreciate that the restraint of trade provision is a matter Mr Yates feels strongly about.

[65] The starting point for a restraint of trade covenant is difference to that of other contractual obligations. Restraints of trade are incapable of being enforced unless they are reasonable. Ms Nichols financial commitment was such that she needed to obtain better paid employment and she had spent most of her working life working for a bank. Ms Nichols advised her new employer of the restraint of trade covenant and an arrangement was reached about clients with the National Bank whereby Ms Nichols does not deal with Marlborough Mortgages existing or new clients. I accept that Ms Nichols did not take any confidential information with her and she is clearly well aware of her obligations in that respect. Mr Yates could not provide evidence that he had lost any clients. I am not satisfied that there was any breach by Ms Nichols of her duty of fidelity and good faith.

**Costs**

[66] I reserve the issue of costs. Mr Turner on behalf of Ms Nichols has until 6 May 2008 to lodge and serve any submissions as to costs and Mr Yates on behalf of Marlborough Mortgages has until 19 May 2008 to lodge and serve any submissions in response.

Helen Doyle  
Member of the Employment Relations Authority