IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 36/09
5154307

BETWEEN	HOSE SUPPLIES (NEW ZEALAND) LIMITED Applicant
AND	JASON RYAN Respondent

5154309

AND BETWEEN	HOSE SUPPLIES (NEW ZEALAND) LIMITED Applicant
AND	MARK DE GOLDI Respondent

Member of Authority:	Philip Cheyne
Representatives:	Mark Beech and Shima Grice, Counsel for Applicant Jeff Goldstein, Counsel for Mr Ryan Kerry Smith and Simon Lean-Massey, Counsel for Mr De Goldi
Investigation meeting	27 March 2009 at Christchurch
Determination:	31 March 2009

DETERMINATION OF THE AUTHORITY

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[1] Hose Supplies (New Zealand) Limited operates a business providing specialist hose fittings and servicing to the chemical, concrete, dairying, food, marine, mining and petroleum industries. Its head office is in Mount Maunganui and it has a branch in Christchurch.

[2] Hose Supplies employed Jason Ryan for some years until he resigned by giving notice on or about 18 December 2008. By that time Mr Ryan's position was Regional Manager for the South Island. He resigned from Hose Supplies to take up a role with Hard Metal Industries (HMI), an Australian company that operates in New Zealand. Once Mr Ryan resigned and told Hose Supplies of his new employment he finished up immediately.

[3] The application numbered 5154307 was lodged on 5 March 2009 seeking ex parte and urgent interim injunctions against Mr Ryan. The application alleges a breach of the duty of fidelity, breach of confidence (misuse of the employer's confidential information), breach of contract and breach of good faith.

[4] Hose Supplies also employed Mark De Goldi as its Key Accounts Manager based in Christchurch. Mr De Goldi resigned by giving notice on or about 19 February 2009. Several days before this Mr De Goldi had told the general manager (Ronald Rae) that he had been offered employment by HMI. Hose Supplies says that Mr De Goldi *finished up* at 8.00am on Monday 23 February 2009.

[5] The application numbered 5154309 was lodged on 5 March 2009 seeking ex parte and urgent interim injunctions against Mr De Goldi. The application alleges a breach of the duty of fidelity, breach of confidence (misuse of the employer's confidential information), breach of contract and breach of good faith.

[6] Both applications were referred to a member of the Authority who declined to deal with the applications on an ex parte basis and the applicant was required to serve the statements of problem and supporting affidavits on the respondents or their solicitors with whom the applicant's solicitor had been corresponding prior to lodging the statements of problem. There was subsequently a phone conference on 13 March 2009 and directions were made for mediation, statements in reply by 16 March and supporting affidavits from the respondents by 20 March 2009; all this with a view to having an investigation meeting during the fortnight starting 23 March 2009. The file was then allocated to me and not without some difficulty the investigation meeting

was eventually scheduled for 2pm on 27 March 2009. On 16 March I declined the applicant's request to lodge affidavits in reply but afforded the applicant the opportunity to lodge and serve any further material in support of the applications **before** 20 March 2009 (emphasis added). The applicant appears to have misunderstood my communication because late on 20 March 2009 the applicant lodged a bundle of documents in part containing new material. That meant that the respondents were unable to comment on the new material in their affidavits due by 4.00 pm 20 March 2009. Further material came from the applicant on Thursday 26 March 2009 (a transcript) and on 27 March 2009 just prior to and during the investigation meeting. By agreement I have had regard to the transcript and (by my direction) I have considered all but the unsworn *field day* information. I have treated the late information with caution bearing in mind the non-sworn nature of the material and the respondents' inability to comment on it.

[7] Scheduling the investigation meeting for 27 March 2009 overtook arrangements for mediation. It would have been better for there to have been mediation but I was not prepared to allow any further delay in bringing the interim injunction applications to a conclusion, given the applicant's understandable concern about time.

[8] For the investigation meeting all counsel provided comprehensive written submissions and spoke to them. In this determination I will not attempt to address all the points made in the submissions because doing that would delay further a determination of these problems. The findings in this determination are solely for the purposes of resolving the applications for interim injunctions; final findings of fact will have to wait an opportunity for witnesses to be questioned on oath. The applications were investigated in a consolidated way so it is sensible and quicker to similarly determine them.

Golden Rock Limited

[9] Andrew Talbut is a director of the parent company of Hose Supplies. After Mr De Goldi resigned Mr Talbut searched the New Zealand companies office website and learnt that Mr Ryan and Mr De Goldi are both directors of and substantial shareholders in a company incorporated on 18 December 2008 called Golden Rock Limited. Mr De Goldi and Mr Ryan say that the company was incorporated to operate a tyre importing business but has not yet traded. They say that any work

associated with the intended business was not done using any of Hose Supplies' resources and that Hose Supplies is not involved in this type of business. The third director and shareholder of Golden Rock Limited who is not involved in these proceedings has apparently confirmed to the applicant's solicitors that the company has not yet traded. I do not have this correspondence nor do I know when it was received by Hose Supplies. In any event there is no evidence to cast any doubt on these statements about Golden Rock Limited, a point accepted by counsel for Hose Supplies Nothing more needs to be said about Golden Rock Limited except to observe that learning of its existence probably aroused considerable, but on the evidence, unfounded suspicion on the part of Hose Supplies.

Jason Ryan – orders sought

[10] Four orders are sought against Mr Ryan. First is an interim injunction to prevent further breaches of confidentiality by ordering Mr Ryan to refrain from using confidential information and/or trade secrets; second is an interim injunction preventing further breaches of a non-solicitation clause in the employment agreement barring solicitation of customers and suppliers; third is an interim injunction preventing Mr Ryan from enticing or attempting to entice away any current employee of Hose Supplies in breach of a non-solicitation clause in his employment agreement; and fourth is an order requiring Mr Ryan to deliver up all confidential information he holds including a laptop computer.

Delivery up of confidential information

[11] I will deal first with the laptop. It contains business records relating to Mr Ryan's work. The evidence indicates that Mr De Goldi was tasked with retrieving the laptop from Mr Ryan. On 18 December Mr De Goldi told Mr Rae that the laptop and a mobile phone would be couriered to Mt Maunganui the next day. Mr Williams is the Sales Manager for Hose Supplies. He says that the mobile phone arrived but the laptop did not. He spoke to Mr De Goldi who said he would sort it out. Nothing arrived by early New Year and when Mr Williams again contacted Mr De Goldi he was told that Mr Ryan had dropped the laptop into the branch and it had been sent. Mr Ryan says that he took the laptop into the branch, boxed it up and left it there to be sent. Mr Rae says that in mid-January he interviewed the Christchurch staff member to be told that Mr Ryan delivered it (ie the laptop) already packed to be sent to Mt Maunganui. Mr Williams says he sought details from the courier records, then spoke

to the person who signed for the package on 24 December 2008 who told him that there was no laptop delivered that day. Mr Williams says that despite looking the laptop has not been found.

[12] The applicant's evidence is unsatisfactory. I have no direct evidence from the person who received the package in Mt Maunganui, no direct evidence from the Christchurch staff member who apparently dispatched whatever it was that Mr Ryan delivered to the branch and I have not been given any of the courier details about what and when. The hearsay evidence from Mr Rae and Mr Williams is not sufficient to cast any serious doubt on what is said by Mr Ryan so as to reach the standard of an arguable case that Mr Ryan still has the laptop. Worse, the applicant's delay in following up on the missing laptop has not been explained. From Mr William's evidence the company knew in *early New Year* that the laptop was missing. Mr Ryan was then approached about the missing laptop on 23 February 2009 and these proceedings were lodged on 5 March 2009. Even if Hose Supplies had established an arguable case that Mr Ryan still had the laptop, delay probably would have ruled out an interim injunction.

[13] There is no evidence to suggest that Mr Ryan has retained anything else belonging to Hose Supplies amounting to its confidential information.

Non-solicitation

[14] There is a signed employment agreement between Mr Ryan and Hose Supplies dated 23 June 2006 in respect of his position as branch manager. It seems to be accepted that these terms applied immediately before his resignation. Clause 29 controls the employee's use of confidential information during and after the employment. It contains a wide but non-exhaustive definition of confidential information. Clause 31 controls solicitation of employees and clients by the employee during the employment and for a period of 6 months after its termination. For various reasons Hose Supplies says that Mr Ryan has breached these obligations.

[15] As noted above, the applicant's solicitors wrote to Mr Ryan on 23 February 2009 alleging various breaches by him of clause 31 in particular, advising him of their instructions to commence proceedings in the Authority and the High Court and requiring him to provide specified declarations and undertakings within five working days. That drew a response from counsel for Mr Ryan. Mr Talbut says that this was

received on 2 March 2009 although the letter is dated 3 March 2009. One point made in the reply is that clause 31 of the employment agreement was varied to apply a three month post termination restriction by effect of a letter dated 23 December 2009 from Mr Rae of Hose Supplies to Mr Ryan as part of his exit from the company. There is no evidence of this from Hose Supplies but I am told by counsel that the 23 December 2009 letter that refers to a three month post termination restriction on solicitation is simply a mistake. In these proceedings Hose Supplies seeks to rely on the six month restriction contained in the 26 June 2006 agreement.

[16] For present purposes I accept that the extract in the 23 December 2008 letter referring to three months rather than six months for the duration of the restraint may be a mistake and that there was no variation. The miscommunication by Hose Supplies and the applicant's complete failure to disclose the existence of the 23 December 2008 letter as part of its application for ex parte, urgent interim orders are matters that will be assessed as part of the overall justice if necessary. Given the finding that Mr Ryan is arguably bound by clauses 29 and 31 for six months post termination I will turn to assessing the evidence of breach.

[17] Mr Ryan is accused of successfully soliciting Mr De Goldi and attempting to solicit the operations manager for Hose Supplies (John Kelly) to work for HMI. The evidence about soliciting Mr Kelly is three phone messages left on his phone around 2.00am on 22 February 2009. In his affidavit Mr Kelly briefly referenced these voicemail messages but did not include a transcript or accurately quote the impugned words. The transcript was received by the Authority on 26 March 2009. The transcript includes the words *Received yesterday at [various times]* so it has been typed up from a copy of the voicemail message made on 23 February 2009: a transcript could have been included with Mr Kelly's affidavit and he could have given me the exact phrase. The transcript must be treated with some caution since its provenance is unsure, it is not part of the sworn material and Mr Ryan has not had an opportunity to comment other than to say he was drunk and wanted to talk with Mr Kelly as a friend. The words on which the soliciting allegation is based are *But, one thing's for sure bud, if you want to have a yarn to me or Goldi about an opportunity. I don't know. I know it's in your back yard, and you're a loyal man to Warwick.* Elsewhere Mr Ryan frequently repeats the theme about Mr Kelly being loyal to Hose Supplies. Overall the messages support Mr Ryan's contention that he was drunk and wanted to speak with Mr Kelly as a friend. In context, I do not

consider that the sound bite complained about amounts even to an arguable attempt to solicit Mr Kelly away from his employment with Hose Supplies.

[18] Mr Ryan is accused of soliciting Mr De Goldi. The evidence of this is a text message from Mr Ryan to Mr De Goldi on 1 January 2009 (mistakenly sent to Mr Kelly) saying *Big Year for you and me Golds, can't wait.* There are phone records from Hose Supplies that report 20 phone calls and text messages from Mr De Goldi's mobile phone to a mobile number that is apparently Mr Ryan's number at HMI in January 2009. Mr Kelly also says that Mr De Goldi told him on 17 February 2009 that Mr Ryan had offered him a job at HMI. Donald Lovell is HMI's managing director. He says that in late January or early February 2009 he made a decision to recruit a further member of staff, contacted Mr De Goldi and on 12 February 2009 made a written offer of employment to him. Mr De Goldi did not accept that offer until 19 March 2009. That aligns with Mr De Goldi's evidence. Mr De Goldi refutes Mr Kelly's evidence by saying that he told him that he had received a job offer from HMI but did not say who from. In addition Mr De Goldi says that he had already told Mr Rae about the approach from Mr Lovell. Mr Rae says that Mr De Goldi told him prior to 17 February 2009 about an approach from HMI. He is silent about whether Mr De Goldi named the contact. At this stage the better view appears to be that Mr Lovell not Mr Ryan solicited Mr De Goldi and that Mr Kelly's recollection is wrong but it is arguable that Mr Ryan might have been attempting to solicit Mr De Goldi.

[19] Having said that, there is no reason to issue an interim injunction restraining Mr Ryan from soliciting any other staff of Hose Supplies during the next three months. Mr De Goldi has already departed and that cannot be undone by an injunction against Mr Ryan. No doubt Mr Ryan will refrain from drunken phone calls to Mr Kelly henceforth. There is no evidence to suggest that anyone else will be solicited. It light of this finding it is not necessary to deal with the difficulties in the actual wording of the clause.

[20] The next aspect to the non solicitation point concerns the second paragraph of clause 31 of the June 2006 employment agreement constraining solicitation of clients for six months post termination. It says

> *The employee shall not …for a period of six (6) months after the termination of this employment, endeavour to solicit or entice away from the employer, directly or indirectly, any client of the Company.*

[21] Part of the evidence supporting this is an email dated 16 January 2009 from Mr Lovell to Solid Energy, a client of Hose Supplies. It is part of the late material. There is no explanation about why it was not part of the sworn evidence. As a result, Mr Ryan has not had a proper opportunity to respond. The email refers to discussions between Hose Supplies and HMI about Hose Supplies supplying HMI products to its clients. Those discussions did not result in agreement. The email says that HMI is keen to supply Solid Energy with *picks for the road headers and continuous miners and consumables for your Coal Bed Methane operation.* It goes on to introduce Mr Ryan as running the Christchurch office and says *Jason will provide you with the same excellent service he has delivered in the past, however with a focus on the drilling and mining products. This range will be expanded shortly to include additional products to provide you with a one stop service.* I am asked to read this as a reference to the product lines carried by Hose Supplies. There is other evidence from Mr Lovell particularly explaining HMI's product range. He makes no mention of hose fittings and servicing but does refer to *associated drilling consumables*. Mr De Goldi says that there is a possibility of some minor cross-over of product ranges between HMI and Hose Supplies but that generally HMI does not supply hosing products to its customers.

[22] There is very little evidence about Hose Supplies' products. Mr Rae tells me that the company business is providing specialist hose fittings and servicing to the chemical, concrete, dairying, food, marine, mining and petroleum industries. Mr Ryan says that its core business is to sell industrial hoses and fittings. There is some evidence about Hose Supplies setting up a specialist division to sell its products to the civil, tunnelling and mining industries and Mr Ryan's involvement in that but that does not go as far as saying that Hose Supplies' product line to those industries will be any different. An inference from the evidence about the unsuccessful business discussions between HMI and Hose Supplies is that the latter did not carry a competing portfolio of products available from the former.

[23] An argument for Hose Supplies on the available material is Mr Ryan's evidence that the orders sought would make his work for HMI difficult. However, in context, that is a comment about the breadth of the orders sought rather than a concession about competing product lines.

[24] Part of Hose Supplies' case against Mr Ryan in respect of soliciting clients is pages 105 and 106 of the bundle of material lodged by the applicant on 20 March 2009. The two pages are described in the bundle index as *Activity report-Ron Rae*. The report purports to be a summary of conversations with key customers visited by Mr Rae on 2, 3, 4 & 5 March 2009. It is unsworn and is hearsay in that (mostly) unnamed people are recorded as suggesting that Mr Ryan and Mr De Goldi said various things. For the reasons explained above the respondents have not been able to respond to what they are reported as saying. I note that Mr Rae's affidavit was sworn on 5 March 2009 so at least some of the material could have been included from the outset. In these circumstances I am not prepared to have any regard to the information recorded at pages 105 and 106 of the bundle.

[25] From all this I struggle to say that there is a case even to an arguable standard that Mr Ryan in his work for HMI would be soliciting or enticing away customers from Hose Supplies to HMI. As counsel acknowledged, there can be no objection based on the contractual duty to Mr Ryan for HMI selling non competing products to Hose Supplies' clients.

[26] It is therefore not necessary to go on to consider the balance of convenience or overall justice.

Use of confidential information

[27] The final aspect of the case against Mr Ryan at this point is the claim for an interim injunction preventing him from using confidential information and/or trade secrets. That is based on clause 29 of the June 2006 employment agreement but there is also said to be a breach of the duty of fidelity and breach of confidence being misuse of the employer's confidential information which seem to be allegations standing apart from the employment agreement.

[28] The allegation of misuse of confidential information is principally based on the information contained in pages 105 and 106 of the applicant's bundle of documents. For the same reasons mentioned above I decline to have any regard to this material. In addition, I am referred to Mr Ryan downplaying his role in the development of Hose Supplies' civil, tunnelling and mining division, his lack of explanation of how he came to be known by Mr Lovell and information indicating

that Mr Ryan first met HMI in July 2008. None of that leads to an arguable conclusion that Mr Ryan misused any of Hose Supplies' confidential information.

[29] Reference is also made to the phone records that show Mr Ryan phoning HMI a number of times in October and November 2008. A reasonable inference from that is that there was discussion about employment with HMI but it does not support a claim of misuse of confidential information even to an arguable standard.

[30] Accordingly, I decline to make any of the orders sought against Mr Ryan.

Mark De Goldi – orders sought

[31] Three orders are sought against Mr De Goldi. First is an interim injunction to prevent further breaches of confidentiality by ordering Mr De Goldi to refrain from using confidential information and/or trade secrets; second is an interim injunction preventing further breaches of a non-solicitation clause in the employment agreement barring solicitation of customers and suppliers; and third is a order requiring Mr De Goldi to deliver up all confidential information he holds including a laptop computer and Pike River Coal documents.

Delivery up of confidential information

[32] The missing laptop belongs to Hose Supplies and was used by Mr Ryan, not Mr De Goldi. Mr Rae says that Mr De Goldi told him on 19 December 2008 that all Mr Ryan's property had been collected including the laptop but that his subsequent inquiries revealed that Mr De Goldi never uplifted the computer from Mr Ryan. Blair Williams is Sales Manager for Hose Supplies. He says that Mr De Goldi told Mr Rae that he was going to collect the laptop and later told Mr Williams that he had not had time to do so. Mr De Goldi's evidence is that he never had possession of the laptop and Mr Ryan's evidence is that he returned it to the branch office, boxed it up at the branch and left it to be sent to Mt Maunganui. At worst Mr De Goldi said he was doing something but never got around to actually doing so. There is no evidence to suggest that Mr De Goldi now has or ever had possession of the laptop computer.

[33] Shortly before his resignation Mr De Goldi apparently asked for and received a print out of Hose Supplies' quote for some product for Pike River Coal. In his affidavit Mr De Goldi says he has no recollection of this and doubts the claim. For present purposes I accept that Hose Supplies may be able to establish what is said

about Mr De Goldi being given this print out. However this is not evidence of Mr De Goldi taking away or misusing Hose Supplies' confidential information. Mr De Goldi specifically says that he has not done this and there is no reason to doubt his assertion.

Mr De Goldi's terms of employment

[34] Mr Rae gives evidence about Mr De Goldi's employment. Specifically he says that Mr De Goldi was employed in 2000, held various roles, was given extended leave on three occasions to pursue a professional rugby career overseas, but a position was held open for him ensuring he had employment with Hose Supplies when he returned. On that basis an employment agreement dated 15 June 2006 is said to comprise still applicable terms of employment, including clauses 29 and 31 in a similar form to those in Mr Ryan's agreement.

[35] Included with the material lodged on 20 March 2009 is a letter of offer dated 12 June 2006 signed by Mr De Goldi on 15 June 2006 offering employment for a fixed term to temporarily replace the injured incumbent. The offer clearly relates to the 15 June 2006 employment agreement. Counsel attempted to persuade me that the employment agreement was nonetheless on its true construction permanent ongoing employment. That may be so but it does not assist the applicant here as explained below.

[36] Mr De Goldi's evidence is that he filled this short-term vacancy for a period during a temporary return to New Zealand in May 2006 and his return to France in about September 2006 to resume playing rugby and working there. He says that no arrangement was made for any leave of absence at that time and all his salary and holiday pay was paid to him and that there was no indication that a job was being kept open for him. He nonetheless remained in contact with Mr Rae. In 2007 Mr Rae sent him an email saying that there was a position available with Hose Supplies as a key accounts manager, they conducted some negotiations by email and he started the job in September 2007. None of these negotiations referred to the issues addressed in clauses 29 and 31 of the 2006 agreement. Mr De Goldi says that he did not sign any letter of appointment, job description or employment agreement before starting his new role.

[37] Comparing Mr Rae's vague evidence about keeping a job open on three occasions with Mr De Goldi's precise evidence about the termination of the temporary employment in 2006 and the negotiations for new employment in 2007, there is no room for a finding even to an arguable standard that the 2006 employment agreement containing the restraint provisions could still be applicable. The terms of Mr De Goldi's employment as at the date he resigned will be found in the emails and other communications between Mr Rae and Mr De Goldi in 2007. There are some post 2007 letters regarding salary increases and the like but they do not assist because they do not reference the 2006 written employment agreement.

[38] I find that there are no contractually binding post termination restraints even to an arguable standard controlling Mr De Goldi's ability to solicit clients or employees of Hose Supplies.

Confidential information

[39] As with Mr Ryan, the use of confidential information complaint is based on the express terms of the employment agreement (dealt with above) but there is also said to be a breach of the duty of fidelity and breach of confidence being misuse of the employer's confidential information which seem to be allegations standing apart from the employment agreement.

[40] Counsel for Mr De Goldi took care to address me about a jurisdictional issue given that the allegation seems to be a claimed misuse of confidential information after the end of the employment which may be an action in the High Court. Without intending any disrespect I do not find it necessary to canvass this submission.

[41] There is evidence that Mr De Goldi had extensive contact with Austrade, an Australian government trade support agency. He apparently contacted someone other than Hose Supplies' usual contact person at Austrade and negative inferences are drawn from that and the frequency of his phone contact. Mr De Goldi went to Australia in October 2008 and brought back a product (Buxplug) via his Austrade contact rather than having it couriered to Hose Supplies' office. In January 2009 he sought further supplies of the product. All this is cast in a negative light by Mr Talbut. However, the emails annexed to Mr Talbut's affidavit show that this was all done on behalf of Hose Supplies. Crucially, there is an affidavit from a senior geologist employed by Solid Energy who backs up Mr De Goldi's explanation about

what happened to the Buxplugs. So it seems that at worst Mr De Goldi routed his contact with Austrade with the wrong person possibly in breach of Hose Supplies' directions. It is not evidence of anything improper regarding a breach of fidelity or breach of confidence.

[42] Mr Talbut says that he had Mr De Goldi's laptop and email activity checked. That threw up several emails about Buxplugs and some other products. In response Mr De Goldi provided a number of emails supporting his contention that he was working on Hose Supplies' behalf in these endeavours. Several but not all Mr De Goldi's emails are said to have been copied to him after these proceedings from the client. That does raise a question about the source of the other emails annexed by Mr De Goldi. However, the more significant question it raises is the applicant's failure to fully disclose relevant email traffic to and from Mr De Goldi that tends to point to an innocent explanation about his contact with Austrade, the dealings over Buxplugs and other products. In any event, none of this gives rise to an arguable claim that Mr De Goldi has misused any confidential information or trade secrets belonging to Hose Supplies either during or after his employment.

[43] For the above reasons all the claims against Mr De Goldi are dismissed.

Summary

[44] All the applicant's claims for interim injunctions fail.

[45] There should be mediation before any further investigation into the substantive problems. Counsel for the applicant should let the Authority know once that has happened whether anything further is required.

[46] Costs are reserved.

Postscript

[47] At the end of the investigation meeting on Friday evening I indicated that I hoped to have a determination available by Monday afternoon or Tuesday morning. Just as I neared completion of this determination the Authority received by email a memorandum from counsel for Hose Supplies. It appears to have been sent only to Mr De Goldi's counsel. The memorandum makes further submissions about the jurisdictional point just dealt with, responds to arguments about "clean hands" made

by counsel for Mr De Goldi and makes further submissions about how the Authority should deal with the *late evidence*. At the investigation meeting counsel for Hose Supplies had a full opportunity to reply to submissions made on behalf of the respondents. He did reply and when he had finished the investigation meeting ended. Earlier in the afternoon he had a full opportunity to address the Authority about the treatment of the *late evidence*. He did address the Authority, part agreement was reached and a ruling was made, as mentioned above. I am therefore surprised that he thinks he should have any further opportunity. I have not determined anything based on the jurisdictional issue important as it may be, I do not intend to revisit my treatment of the so called *late evidence* and there is merit in both respondents' *clean hands* argument as discussed above.

Philip Cheyne
Member of the Employment Relations Authority