

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 216/09  
5286673

BETWEEN                      PRECISION TRACKING (NZ)  
   LIMITED (Formerly CTL  
   Finance Limited)  
   Applicant

AND                              JEFFREY DAVID TAIT  
   Respondent

Member of Authority:      Helen Doyle

Representatives:            Sherridan Cook and Aaron Harlowe, Counsel for  
   Applicant  
   Andrew Marsh, Counsel for Respondent

Investigation Meeting:      11 December 2009

Determination:              16 December 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Precision Tracking (NZ) Limited (Precision Tracking), formerly CTL Finance Limited (CTL), seeks from the Authority an interim injunction until the matter can be finally determined enforcing an restraint of trade covenant and confidentiality obligations that Jeffrey Tait has in his employment agreement with his previous employer, Precision Tracking Limited (PTL) (in receivership). Precision Tracking purchased the assets and goodwill of PTL and says that Mr Tait's restraint of trade covenant and confidentiality obligations were assigned to it by PTL.

[2] The employment agreement dated 1 August 2003 was expressed to be between the Precision group of companies (Precision Farming Limited, Precision Tracking Limited, Precision Finance Limited and any other companies that are part of the group) and Mr Tait. Precision Tracking say the following clauses in the employment agreement are relevant:

**Clause 3 - Intellectual Property Rights:** *The Precision group of companies shall be entitled to all property, copyright, and other intellectual property rights which are produced by the Employee under this agreement.*

**Clause 5 - Conflict of Interest:** *While the Employee is working for the Precision group of companies, they will devote their best efforts to the interests of the Precision group of companies and will not engage in any activity that is hostile to or competitive with the Precision group of companies, or so which occupies their attention as to interfere with the proper performance of their duties for the Precision group of companies.*

*When the Employee ceases to work for the Precision group of companies, they will not be involved in starting up a competitive business providing GPS or positioning-related services to the agricultural and transport industries in New Zealand within 1 year of ending employment with the Precision group of companies.*

**Clause 6 – Confidential Information** *As an Employee for the Precision group of companies, the Employee is required to sign the attached confidentiality agreement. During and after the employment period, the Employee will keep strictly confidential and not disclose outside of the Precision group of companies any information not publicly known, and will not use information about or belonging to the Precision group of companies, or companies that it does work for, unless authorised in writing by the Precision group of companies.*

[3] Mr Tait does not accept that he is in breach of clause 5 or clause 6 of his employment agreement. He also raises issues as to whether his restraint of trade covenant was capable of being assigned to Precision Tracking.

[4] The parties attended mediation on 25 November 2009 but mediation was not successful in resolving the employment relationship problem.

[5] An investigation meeting was originally scheduled for Friday 4 December 2009 but was rescheduled for 11 December 2009 because some of the evidence in affidavits in reply lodged on behalf of Precision Tracking was not evidence strictly in reply. I accept that was mainly because it was material not available at the time the original affidavits were lodged. Mr Marsh, although not objecting to the appropriateness of the material being before the Authority, wanted an opportunity to

respond to material and leave was granted for the lodging and serving of further affidavits.

[6] I dealt with the investigation with respect to the interim application on 11 December 2009 on the basis of the affidavit evidence provided and detailed submissions of Mr Cook and Mr Marsh which occupied, unusually, almost a full day.

[7] An interim injunction involves the exercise of a discretion. It is recognised that the answer to an interim injunction is not in the rigid application of a formula, but there are two broad questions of whether there is a serious issue to be tried; and where the balance of convenience lies. The final question requires the Authority to stand back and ascertain where the overall justice lies – *Klisser Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).

[8] The following issues are required to be determined by the Authority against the background facts from the affidavits relating to this matter:

1. Is there a serious issue to be tried?
  - Is the restraint of trade covenant enforceable by Precision Tracking?
  - Are the obligations of confidentiality under the employment agreement and at common law enforceable by Precision Tracking;
  - If so, has Mr Tait breached his obligations under the restraint of trade covenant and his confidentiality obligations.
2. Where does the balance of convenience lie?
3. What does the justice of the case require?

### **The background facts**

[9] PTL, now in receivership, was incorporated in 2003 with Mr Tait as the sole director. Mr Tait is still a director, shareholder and was an employee of PTL. Mr Tait identified when he started PTL the need for a form of off-road GPS mileage system within the trucking industry in relation to the road user charges and rebates on those charges. He contracted with specific software designers to come up with a software solution in relation to the off-road system.

[10] Precision Tracking consider PTL's marquee asset was its off road tracking system and the software in the system enabled PTL and now Precision Tracking to track and record when a vehicle is operating on a private road/farm and not a public road. The software enables Precision Tracking to accurately claim reimbursements for customers for road user charges incurred for all kilometres accrued while operating off public roads. Precision Tracking say that its accuracy and technology is unique.

[11] Brendon Cane became involved in PTL through his company, CTL in or about 2006 when he wanted on behalf of CTL, a GPS mapping system, which Mr Tait offered to develop. In or about April 2008 Mr Tait offered Mr Cane a shareholding. In or about June or July 2009 Mr Cane made a decision to repay PTL's debt to the Bank of New Zealand (BNZ) and took by way of subrogation all the rights, interests and title under BNZ's General Security Agreement (GSA) that Mr Cane guaranteed on 22 December 2008. Under the power of that GSA Mr Cane appointed receivers over PTL on 3 August 2009. The receivers decided to sell the assets and goodwill of PTL and put them up for tender. Mr Cane and a Trust of which he and his wife are trustees, the Lugarburn Trust, was successful in their bid for the assets and goodwill of PTL and CTL then became Precision Tracking (NZ) Ltd. Mr Cane is a director of Precision Tracking.

[12] A sale and purchase agreement dated 1 September 2009 was entered into between CTL Finance Limited and the Lugarburn Trust and PTL in receivership.

[13] The receivers terminated Mr Tait's employment on 12 August 2009 under the Receivership Act 1993 but retained him on a week to week basis to undertake tasks to assist the receivers until 4 September 2009.

[14] On 8 August 2008 Mr Tait opened a Gmail email account and documents sent by email and/or accessed during the receivership period by Mr Tait which were considered relevant were provided as exhibits to the affidavit of Campbell McKenzie dated 2 December 2009, a computer forensic expert, in support of Precision Tracking's application for an interim injunction.

[15] Mr Tait acknowledged in para. 34 of his first affidavit in opposition to the application for interim relief that he had access to some of PTL's and Precision Tracking confidential information (including the PTL off-road system) via the back

up hard drive at his home although denied he had used it or that he had any intention to do so. Counsel have since taken steps to protect this hard drive and as I understand from Counsel two copies.

[16] On 28 September 2009 a company Lint Limited (Lint) was incorporated. The sole director of Lint is Mr Tait's partner Katherine McElwain and Mr Tait is employed by Lint as the manager. Mr Tait at para.17 of his first affidavit states that Lint provides the following services:

- (a) Software development on a contractual basis;
- (b) GPS hardware and software testing;
- (c) General software consultancy service in other fields.

[17] One of Lint's first customers was Minorplanet (New Zealand) Pty Limited (MPNZ) which company provides vehicle tracking services and competes with Precision Tracking but was also a customer of PTL. The General Manager of MPNZ Warren Tretheway in his first affidavit refers to the customer relationship with PTL as some of MPNZ's customers preferring PTL's system while others used the MPNZ system so using PTL's system did add value to the business of MPNZ. The main value Mr Tretheway says in his affidavit was that PTL had staff that completed the claim process and liaised with NZ Transport Agency for all audit requirements. Mr Tait deposes in para.18 of his first affidavit that Lint has been asked to update MPNZ's off-road tracking system in New Zealand.

**Is there a serious issue to be tried?**

*Is the restraint of trade covenant enforceable by Precision Tracking?*

[18] Precision Tracking rely on the assignment of the restraint of trade covenant under the Sale and Purchase Agreement dated 1 September 2009 and the Deed of Assignment dated 11 September 2009.

[19] Mr Marsh submits that while the Sale and Purchase Agreement between CTL and the trustees of the Lugarburn Trust and PTL in receivership specifically included a restraint of trade covenant between the vendor and the purchaser in clause 15, it did not in terms of Mr Tait.

[20] The Deed of Assignment provides in clause 1:

*In consideration of payment to the Assignor of the Purchase Price and to the extent that such assignment has not already occurred pursuant to clause 2.5 of the Sale and Purchase Agreement, the Assignor assigns to the Assignee absolutely all rights, title and interests created by clauses 15 and 16 of the Shareholders Agreement and clause 5 and 6 of the Employment Agreement, including all common law and equitable rights connected with them with effect from the date of this Deed.*

[21] The Deed of Assignment was entered into after the termination of Mr Tait's employment and after the Sale and Purchase Agreement, but was to be read subject to and in accordance with that Agreement.

[22] Clause 2.5 of the Sale and Purchase Agreement provides that on completion of the sale the vendor assigns all the business intellectual property, the business contracts and the goodwill. Read together with the definitions in clause 1 of the Sale and Purchase Agreement of business intellectual property, goodwill and intellectual property and in conjunction with schedule 3 of the Agreement, it may be arguable that to the extent that the restraint of trade provision was capable of assignment it was assigned by virtue of the Sale and Purchase Agreement and/or the Deed of Assignment. Timing arguably is less of an issue in terms of the Deed of Assignment given that the obligations under covenants of restraint in trade continue to survive after termination.

[23] Mr Cook in his submissions referred to the principle that the benefit of a contract may be assigned as long as it is not personal to the party and that contracts establishing an employment relationship are usually considered personal and therefore non-assignable – *Nokes v. Doncaster Amalgamated Collieries Limited* [1940] A.C 1014. Mr Cook goes on to submit that as a matter of commercial law restraints of trade designed to protect the goodwill of the business may be assignable to a purchaser of that good will– *Welstead v. Hadley* 21 TLR 165. Chapman J in the Supreme Court case of *William v. Masters* [1912] 31 NZLR 1148 stated:

*The last of these cases support the proposition that such a covenant in an agreement for personal services is not recognised as a purely personal covenant and may be enforced by an assignee of the goodwill. Unless it is shown to be sold with the goodwill of the business, however, it is still regarded merely as a personal agreement.*

[24] The Full Court of the Employment Court in *PGG Wrightson Ltd v. Jary* (unreported) 10 October 2008 CC14/08 considered the preliminary question of

whether, where an individual employment agreement contains a restraint of trade, can the benefit of that restraint be assigned by the employer to a third party and enforced by that third party against the employee.

[25] The Full Court was referred to the same cases that Mr Cook and Mr Marsh referred me to. The Court stated in *Jary* that while *Williams v. Masters* contained discussion of principles the case was decided on another point and what Chapman J said on the issue which was before them must be regarded as *obiter dicta*. Mr Cook referred to the High Court case of *Castle Parcels Limited v. Dale* [1988] 2 NZELC 96, 774 which was a case involving independent contractors in an application for an interim injunction. It was stated in that case by Henry J:

*Read as a whole and in the context of the operation of this business, I am inclined to the view, but without deciding the issue, that the contract is to be classed as one involving personal skill and confidence on the part of both parties, and therefore under general principles not itself assignable. That does not necessarily mean that the covenant in restraint of trade, although contained within such a contract, cannot form part of the goodwill of the business to which it attached, the benefit being assignable to any purchaser of that business.*

On that basis it was found there was a serious issue to be tried as to whether the benefit of the covenant had now become vested in and was able to be enforced by the plaintiff by virtue of the transfer to it of its business and its goodwill. It was not considered appropriate by Henry J to decide that issue on the interim application.

[26] Heron J applied the decision of *Castle* in *Gardener v. Cooper* (24 October 1990, HC, Auckland, CP136/90) to find an arguable case was established. In *Jary* the Employment Court stated in para.[15] amongst other matters:

*A major difficulty with Gardener v. Cooper is that it was dealing only with an application for interim relief and Heron J made it clear that he was concerned only to establish whether there was a serious issue to be tried.*

[27] I accept Mr Marsh's submissions that the Court's view of the enforcement of contracts in *Gardener* in general was a strong one and arguably the assessment in terms of parties to an employment relationship under the Employment Relations Act 2000 may be different.

[28] Mr Marsh placed reliance on the High Court decision of *Post Haste Couriers Ltd v. Casey* (CP83/89, Invercargill High Court, 24 October 1990). Unlikely *Gardener* he submitted this was a decision on the substantive merits of the case. *Post Haste* concerned a courier engaged under a contract for services although the contract Holland J stated very closely resembled a contract of services. Holland J found in that case:

*I accordingly am of the view that the total contract and the covenant in restraint of trade were not assignable and were not assigned by the second plaintiff to the first plaintiff because of the personal relationship contemplated by the parties and no inference that the courier intended to be contractually bound to an assignee.*

[29] Holland J referred to two other situations where an assignee can enforce some form of restraint of competition clause. The first he referred to was where the covenant was found to be specifically for the benefit of the assignee and the second where the plaintiff and defendant were both parties to the assignment of the goodwill of the business, including the mutual restraint of competition agreement to a company. The Employment Court in *Jary* referred to the *Post Haste Couriers* decision and stated:

*What emerges most clearly from the Post Haste Couriers decision is that it turned on the particular facts of the case rather than any general principle.*

[30] Mr Marsh submits, correctly in my view, in reliance on *Jary* that ultimately in finally determining this matter the facts in this case are going to be important and these may well include the way the employment of Mr Tait ended and may involve considerations about how the receivership and sale to Precision Tracking came about and from the untested affidavit evidence of Mr Cane and Mr Tait there is, in all likelihood, no agreement about that.

[31] Mr Marsh encouraged me to have regard to what he submits are general principles of law in *Post Haste* to determine the matter and find that there is no arguable case that the restraint of trade covenant is capable of assignment to Precision Tracking because of the personal relationship contemplated between PTL and Mr Tait and further because there is no inference that can be drawn that Mr Tait intended or consented to the assignment. In that regard he refers to Mr Tait's first affidavit, para.24 and 25, where Mr Tait states amongst other matters:

*I would never have signed the employment agreement with the restraint in it if I had been aware that another investor could put the company into receivership, sell the assets of the company out from under me for significantly less than they were worth, leave me with nothing despite having built the company up over 6 years for little reward, and then seek to stop me from undertaking any further employment in my chosen field.*

*The assignment of the restraint of trade took place without my knowledge or consent. I would never have agreed to this had my consent been sought. As stated above, I have been left with nothing from this entire situation and I am considering a claim against Brendon for breach of his duties as a director as a result.*

[32] The Full Court of the Employment Court in *Jary* concluded that *Post Haste Couriers* turned on its own facts rather than on a general principle of law that the benefit of a covenant in restraint of trade in employment agreements cannot be assigned by an employer to a third party and cannot be enforced by that third party. On that basis therefore I conclude that there is at this interim stage a serious issue to be tried but there are nevertheless some significant legal obstacles for Precision Tracking to overcome as to whether the restraint of trade covenant in Mr Tait's employment agreement with PTL could be assigned to Precision Tracking and whether it can be enforced by Precision Tracking.

[33] I have gone on to consider the reasonableness of the restraint and whether there is evidence of a breach of the restraint of trade covenant.

#### **Reasonableness of the restraint**

[34] A covenant in restraint of trade is prima facie unlawful but can be enforced if it is found to be reasonable as between the parties and with reference to public interest.

[35] I find that it is arguable in this case that the restraint of trade covenant is to protect proprietary interests in software that PTL had developed, trade connections and in terms of Mr Tait's position at PTL that brought him into close contact with clients, the goodwill in terms of customer relationships.

[36] Mr Marsh submitted that the duration in the restraint of trade covenant of one year, the geographic ambit of the whole of New Zealand and the scope of the covenant itself is too broad and thereby unreasonable. Mr Cook submitted that when the restraint was entered into Mr Tait was the Managing Director and major

shareholder of PTL and there was no imbalance of bargaining power and further that the clause is no wider than reasonably necessary to protect the proprietary interest of the applicant. Further I consider the restraint clause could be said to be quite restrictively drafted in terms of prohibiting involvement in starting up a competitive business. Arguably that does not prohibit employment in a competitive business.

[37] At this interim stage on the untested affidavit evidence I conclude that Precision Tracking has an arguable case that the restraint is reasonable.

**Has Mr Tait breached the restraint of trade?**

[38] Mr Marsh submits on the untested affidavit evidence Mr Tait and Lint are not competing with Precision Tracking and therefore it is not a competitive business as required to fall within the terms of the restraint covenant.

[39] I find that there is an arguable case at this interim stage that Mr Tait is competing in breach of the restraint of trade on the basis of the untested affidavit evidence:

- MPNZ was previously PTL's customer and is a competitor;
- Mr Tait is manager of Lint. Although he is not a director of Lint it is arguable that he was involved in starting up the company and that Lint in providing GPS or positioning related software services to MPNZ is in competition to Precision Tracking.
- A proposal to provide a permanent on-road and off-road solution for MPNZ was prepared by Mr Tait – see affidavit of Campbell McKenzie, exhibit "P", para.48. Mr McKenzie deposes in his affidavit that this proposal was created on 26 August 2009 at 12.03pm. Also relevant are exhibits "K" and "O";
- It is at least arguable on the untested affidavit evidence that Lint provides the same services to MPNZ that PTL did in terms of off-road tracking services for clients on behalf of MPNZ.

[40] I find in conclusion there is an arguable case that the restraint of trade covenant in clause 5 of the employment agreement is reasonable and that Mr Tait is competing in breach of the covenant. Precision Tracking is however faced with some

serious legal obstacles as to whether the restraint of trade covenant was capable of being assigned to it and whether it can enforce that restraint of trade covenant against Mr Tait.

**Are the obligations of confidentiality enforceable by Precision Tracking?**

[41] It is accepted on behalf of Mr Tait that the obligations of confidentiality owed by Mr Tait are enforceable.

**Were the obligations of confidentiality breached by Mr Tait?**

[42] I am satisfied that there is an arguable case on the untested affidavit evidence that Mr Tait breached his obligations of confidentiality for the following reasons:

- Mr Tait had in his possession without authority from the receivers two customer lists which contained detailed information of Precision Tracking's customers addresses, registration numbers of vehicles, off-road tracking statistics of vehicles and trucks per customer that use Precision Tracking's system;
- Although Mr Tait argues about the purposes for accessing Precision Tracking's cash flow forecast, he does not dispute that he used a Gmail account specifically set up to transfer sensitive information and sent these cash flow forecasts to at least two other people;
- A proposal was created for MPNZ which appeared to be based on systems knowledge, although disputed as to whether it was specialist knowledge, acquired through work performed for PTL by Mr Tait;
- There was some discussion by email between the director of MPNZ and Mr Tait as to whether Mr Tait would be in a position to encourage Precision Tracking customers to move to MPNZ;
- That Mr Tait retained one hard drive at his home and did not inform Precision Tracking until he lodged his first affidavit and neither did he obtain permission and authorisation to remove or retain the hard drive.

[43] Mr Tait says that he has not used and does not intend to use the confidential information of Precision Tracking. Precision Tracking are entitled to draw inferences

from his possession of the confidential information and accessing of information and otherwise dealing with it through the Gmail email account that there is a very real risk that he has used this this confidential information. From the untested affidavit evidence it is arguable that Mr Tait has not been altogether forthcoming in terms of the confidential information that he held at an early stage, or at the very least, as is submitted by Mr Cook *walked a very fine line*.

[44] I find that there is a serious issue to be tried that Mr Tait has breached the obligations of confidentiality that he owes to Precision Tracking.

### **Balance of convenience**

[45] The Authority is required, in terms of this test, to assess the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not being granted in terms of considering the balance of convenience.

[46] I indicated to the parties that the Authority would be able to deal with this matter in February or March 2010. Having had an opportunity following the investigation meeting to consider my calendar in more detail, and in light of advice from counsel that the matter would in all likelihood take two days duration, I am able to offer the parties a date on 9 and 10 February 2010 to deal with the matter. It may be, that given the important question of law about the assignment of a restraint of trade covenant, the parties wish to have the matter heard by the Employment Court.

[47] I have balanced the inconvenience to Precision Tracking of not having Mr Tait prevented under the restraint of trade covenant from continuing to work for Lint to the inconvenience for Mr Tait if he is prevented from continuing to work and earn a living. I have also balanced convenience in terms of the confidentiality obligations.

[48] I conclude in relation to the confidential information that the balance of convenience favours Precision Tracking. In terms of the restraint of trade covenant I have taken into account the close proximity of a date for a substantive investigation meeting and conclude in light of that damages would be an appropriate remedy for Precision Tracking. I consider that they could be assessed without too much difficulty in terms of work performed by Mr Tait as manager of Lint for MPNZ and its customers for that short period. The untested affidavit evidence suggests that

about four clients have left Precision Tracking and are now customers of MPNZ although it is not accepted by Mr Tait that this is due to any action on his part.

[49] I have placed some weight on Mr Tait's offer for an independent assessment by Precision Tracking of Lint software. Whilst the value of this is disputed by Precision Tracking as not being informative I nevertheless weigh it in favour of Mr Tait in relation to the restraint of trade covenant.

[50] I find that the balance of convenience favours Precision Tracking in terms of ensuring confidential information is not used or disclosed but favours Mr Tait in terms of him not being restrained from working pending a final determination of the matter.

[51] I now stand back and consider the overall justice of the case. There are legal challenges facing Precision Tracking in respect of enforcing the restraint of trade covenant and with an early date for the substantive investigation meeting and damages capable of being assessed for that short period I conclude that the overall justice in terms of the restraint of trade covenant favours Mr Tait and there will not be an order restraining him in terms of clause 5 of his employment agreement at this time from working for Lint.

[52] The justice of the case does favour Precision Tracking in terms of obtaining orders to protect its confidential information particularly in light of what has been disclosed from forensic examination of Mr Tait's computer and the confidential material that Mr Tait had but did not disclose to Precision Tracking at an early date. It was suggested to me by Mr Cook that I should restrain Mr Tait from any inequitable springboard advantage arising from the confidential information in terms of competitors – *Bradford Trust Limited v. Paul Edward Roebeck Limited & Ors*, 7 December 2006, HC Auckland, CIV 2006-404-0007111, Venning J. In the exercise of my discretion I conclude that an order that Mr Tait not use or disclose confidential information at this interim stage will be adequate protection.

[53] I therefore make the following orders:

Pending the determination of this proceeding or earlier order of the Authority Jeffrey Tait is to keep strictly confidential and is not to disclose any information belonging to Precision Tracking (NZ) Limited and further is not to use the information about or belonging to Precision Tracking (NZ) Limited.

I further order that Jeffrey Tait within 5 days deliver up to Precision Tracking or its solicitors all of its confidential information that he has in his possession, power or control and any copies that he may hold including:

- (a) The source code for Precision Tracking (NZ) Ltd's software;
- (b) Information concerning the critical steps in building Precision Tracking's software, including its concept, design goals and functionality, how accuracy is achieved and how the software relates to the Lint system;
- (c) Cash flow forecasts;
- (d) Client information, including details of other clients vehicles, GPS units and whether or not they are real time, and on-road and off-road mileage data;
- (e) Information regarding business opportunities for Precision Tracking (NZ) Ltd.

### **Costs**

[54] I reserve the issue of costs and these will be dealt with after the substantive matter has been determined.

[55] A support officer will discuss the dates in February 2010 proposed with counsel and the Authority will then make timetabling directions.

Helen Doyle  
Member of the Employment Relations Authority