

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 224
5312456

BETWEEN	WARREN SKERRETT INVESTMENTS LIMITED First Applicant
AND	CAMELOT NEW ZEALAND LIMITED PARTNERSHIP Second Applicant
A N D	DONALD BROAD Respondent

Member of Authority: Helen Doyle

Representatives: Rob Towner, Counsel for Applicants
Peter Churchman QC, Counsel for Respondent

Investigation meeting: 18 and 19 June 2013 at Dunedin

Submissions Received: 26 July and 29 August 2013 from Applicant
19 August 2013 from Respondent

Date of Determination: 31 October 2013

DETERMINATION OF THE AUTHORITY

- A. The restraint of trade in clause 11.7.1 is unreasonable and unenforceable.**
- B. The Authority has not exercised its discretion to modify clause 11.7.1 under s 8 of the Illegal Contracts Act 1970 and the restraint of trade covenant is unenforceable.**
- C. The benefit of the restraint of trade covenants in clause 11.7 of the employment agreement between the first applicant and the**

respondent are not capable of being assigned and were not assigned to the second applicant. The second applicant's claim to enforce the restraint of trade provisions in the employment agreement between the first applicant and the respondent is dismissed.

- D. The Authority has found one breach of clause 4.2 of the employment agreement by the respondent but no further breaches of that clause. No damages arise as a result of the breach found.**
- E. The Authority has not found that there were breaches of confidentiality established.**
- F. Costs are reserved and failing agreement a timetable has been set.**

Prohibition from publication

[1] I prohibit from publication financial details of clients of the first and second applicants except to the limited extent referred to in this determination.

Employment relationship problem

[2] The first applicant, Warren Skerrett Investments Limited (WSIL) is a duly incorporated company that carried on business as a specialist investment adviser in the lower South Island. The sole director of WSIL is Warren Skerrett.

[3] WSIL employed Mr Broad in or about May 2008 as the sole financial adviser in its Dunedin office and says that Mr Broad breached express obligations in his employment agreement of fidelity, confidentiality and non-solicitation of clients during his employment and following his resignation on 29 July 2009. WSIL claim damages as a result of the breaches to 30 September 2009.

[4] On 30 September 2009, WSIL sold its business to the second applicant, Camelot New Zealand Limited Partnership (Camelot) pursuant to a sale and purchase agreement. Camelot is a nationwide partnership that employs over 30 financial advisers.

[5] Camelot says that Mr Broad's employment agreement with WSIL was assigned to it pursuant to the sale and purchase agreement dated 30 September 2009.

It claims damages as a result of Mr Broad's breaches of contract from 1 October 2009 to 29 July 2011.

[6] An application was made the day before the commencement of the Authority's investigation meeting for amendment to the second amended statement of problem. Although opposed by the respondent, the Authority granted the application which extended the first two remedies claimed by the applicants in the second amended statement of problem by the addition of the words *and/or clause 11.7.1*. The first and second applicants seek remedies as below:

- (a) An inquiry into what loss the first applicant has suffered as a result of the respondent's breach of clause 4.2 and/or 11.7.1 of the employment agreement, estimated by the first applicant at \$7,430.80 and an order for damages;
- (b) An inquiry into what loss the second applicant has suffered as a result of the respondent's breach of clause 4.2 and/or clause 11.7.1 of the employment agreement, estimated by the second applicant at \$91,580.03 and an order for damages;
- (c) An order for damages in the sum of \$41,349.90 pursuant to clause 11.7.3 of the employment agreement to be apportioned between the first and second applicants in the amounts of \$14,048 for the period 29 July 2009 to 30 September 2009 and \$27,301 for the period from 1 October 2009 respectively;
- (d) Alternatively, an inquiry into what loss the first applicant has suffered as a result of the respondent's breach of clause 11.7.1 of the parties' employment agreement, estimated by the first applicant to be \$511 and an order for damages;
- (e) An inquiry into what loss the second applicant has suffered as a result of the respondent's breach of clause 11.7.1 of the parties' employment agreement, estimated by the second applicant to be \$40,838. This is based on \$13,536.57 being the amount of total loss that can be apportioned to the second applicant in relation to clients who transferred to Broadbase Central after the respondent's employment terminated and prior to 30 September 2009 and \$27,301.44 for the loss

in relation to clients who transferred to Broadbase Central after 1 October 2009 and an order for damages;

- (f) If the Authority, as a result of its investigation, considers that any aspect of clause 11.7 of the parties' employment agreement is illegal, the first and second applicants seek an order pursuant to s 8 of the Illegal Contracts Act 1970 modifying clause 11.7 to the extent that it is necessary to remedy any issue of illegality; and
- (g) Costs.

[7] Mr Broad says in respect of the claim by WSIL and Camelot that:

- (a) He has not breached the employment agreement with WSIL;
- (b) He has not solicited work from clients of the first applicant;
- (c) To the extent that he has carried out work for former clients of WSIL, such work is not in breach of his employment agreement;
- (d) Clause 11.7.1 is not reasonable;
- (e) He was never in an employment relationship with Camelot;
- (f) He has no knowledge of any assignment of his employment agreement to Camelot;
- (g) He denies that an employment agreement can be assigned by one employer to another without the consent or knowledge of the employee.

Issues

[8] The Authority needs to determine the following issues:

- (a) Reasonableness of clause 11.7.1 in the employment agreement between Mr Broad and WSIL dated 4 September 2009:
 - (i) What does clause 11.7.1 provide?
 - (ii) What proprietary interest is clause 11.7.1 designed to protect?

- (iii) Is the duration of the restraint reasonable?
 - (iv) Consideration;
 - (v) If the restraint is unreasonable, should it be modified under s 8 of the Illegal Contracts Act 1970?
- (b) Allegations of breach:
- (i) Was there a breach by Mr Broad of clause 11.7.1 of his employment agreement?
 - (ii) Was there a breach by Mr Broad of clause 4.2 of his employment agreement?
 - (iii) Was there a breach by Mr Broad of the confidentiality obligations in clause 11.7.2 of his employment agreement?
- (c) Was Mr Broad's employment agreement and the benefit of the restraint of trade assignable to Camelot?
- (d) Remedies:
- (i) If it is established that Mr Broad did breach his employment agreement, what remedies are available?
 - (ii) Is clause 11.7.3 of the employment agreement, relied on to calculate damages for 13 clients who transferred to Broadbase after Mr Broad's employment ended during the restraint period, a liquidated damages clause or a penalty provision?
 - (iii) Is the Authority satisfied that general damages should be awarded on the basis claimed by the first and second applicants in the event that the liquidated damages clause is found to be a penalty provision?
 - (iv) If breaches are found what remedies should be awarded?

The background against which these issues are to be determined

[9] WSIL was incorporated in 1982 and built up a client base trading as Skerrett Financial Planning. The main services that WSIL offered were investment and insurance advice to a client base predominantly located in Otago and Southland.

[10] In 2007, WSIL entered into a revenue sharing exercise with Grosvenor Financial Services Group Limited (Grosvenor) and joined Camelot Partners Limited, a group of 12 financial advisory businesses from throughout New Zealand, in exchange for cash and shares.

[11] Mr Skerrett became acquainted with Mr Broad when WSIL purchased Broadbase Otago Limited (Broadbase) pursuant to a sale and purchase agreement dated 29 February 2008. Mr Broad had been employed at Broadbase as a financial planner since February 2004. Prior to that he had worked for many years in the banking industry. The owner of Broadbase was Bruce Wood.

[12] The settlement date as stated in the sale and purchase agreement between WSIL and Broadbase was extended with settlement taking place on 1 May 2008.

[13] By email dated 9 April 2008 to Mr Broad and another employee, Mr Skerrett advised that settlement of the business was under way and stated in the final paragraph:

The CEO of Grosvenor Alan Yeo (the actual Boss) is interested in discussing your Future with the Company as part of your employment contracts with the FIRM. He resides in Australia and travels to New Zealand and has committed a day to come to Dunedin on Wednesday the 21st of May, so please keep this day clear. In the interim we are committed to honour your existing Employment contract conditions until we agree on new ones.

[14] Negotiations took place with Mr Broad from in or about May 2008 until an employment agreement was signed on 4 September 2008.

[15] Mr Broad was resistant to the proposed restraint of trade provision. He had not had a restraint of that nature in his employment agreement with Broadbase. He was also unhappy with some of the other terms that he had enjoyed in his current employment agreement about which the proposed employment agreement was silent. These matters were part of the negotiations.

[16] On 27 August 2008, Mr Broad travelled to Wellington to meet with the CEO of Grosvenor, Mr Yeo. Some changes were made to the employment agreement including the *carve out* of six clients from the restrictive covenant. The changes were confirmed in an email from Mr Yeo dated 28 August 2008 (document 11 common bundle of documents).

[17] Mr Broad gave one month's notice of his resignation by letter dated 29 June 2009. Mr Skerrett advised Mr Broad in an email on 1 July 2009 that there was a rumour he was teaming up with Ross Valentine from Broadbase Central Limited (Broadbase Central). He reminded Mr Broad of his obligations in his employment agreement. On 3 July 2009, Mr Skerrett sent Mr Broad a letter acknowledging his resignation and setting out his contractual obligations in the employment agreement. Mr Broad was placed on garden leave from 3 July 2009 until the notice period ended on 29 July 2009. Mr Broad commenced working at Broadbase Central from 30 August 2009. Mr Valentine was the sole director of Broadbase Central which in May 2010 changed its name to Southern Wealth Management Limited.

[18] During the period between the tendering of Mr Broad's resignation and the end of his employment on 29 July 2009, about 11 clients transferred their business to Broadbase Central. In the five months following Mr Broad's resignation, Mr Skerrett says a further 13 clients transferred their business to Broadbase Central. There may be an issue about double counting some of the clients but I shall address that later in this determination.

[19] On 30 September 2009, WSIL transferred 100 per cent of its revenue, client servicing rights, and assets to Camelot New Zealand Limited Partnership (Camelot). WSIL became a shell company and was deregistered from the companies register in November 2011 and restored on 20 May 2013. Mr Skerrett is employed as a salaried advisor by Camelot.

[20] The Authority heard from Kok Yaw Chong (Eric) who is now employed by an Australian financial advisory company in Brisbane but was previously employed by Grosvenor Financial Services Group Limited (Grosvenor) as a Senior Manager. Mr Chong in his role with Grosvenor assisted the Camelot Group in relation to systems, processes, databases, compliance, training, sales, human resource and legal issues. He became involved with WSIL and Mr Broad in this role. Mr Chong

confirmed in his evidence that he was authorised to give evidence on behalf of Camelot.

Reasonableness of the restraint of trade

[21] A covenant in restraint of trade is prima facie unlawful as contrary to public interest and therefore is unenforceable unless it is reasonable as between the parties to the employment agreement and in the public interest.

[22] Reasonableness is to be measured at the time the covenant was given and requires an assessment of all the relevant surrounding circumstances including the nature and duration of the restraint. The nature of the employer's business and the relationship between Mr Broad and the clients of the business are important in this case.

[23] To be enforceable, a covenant in restraint of trade should be no wider than the circumstances reasonably require. The adequacy of consideration may also be relevant to determining the reasonableness of the restraint of trade – *Fuel Espresso Ltd v. Hsieh* [2007] 2 NZLR 651 (CA) at [20].

[24] I shall set out clause 11.7 and the four sub clauses that follow:

11.7 Non-Solicitation of Clients

11.7.1 The Employee agrees that for a period of two years following the termination of their employment for whatever reason, they shall not, either personally, or as an Employee, consultant or agent for any other entity or Employer, seek to solicit or carry out any work of the same nature for any client or customer of the Employer with which the Employee had any contact or dealings whilst employed by the Employer within the Southland and Otago region.

11.7.2 Moreover, the Employee shall not, at any time following the termination of this agreement, use any confidential material which is deemed to be the property and/or confidential trade secret of the company, as per clauses 11.1 and 11.2, for any purpose whatsoever, including the direct or indirect solicitation of any Client or Customer.

11.7.3 If during the period of 2 years following their termination of employment for whatever reason, the Employee does solicit or carry out any work of the same nature for any existing client or customer of the Employer with whom the Employee had any contact or dealings whilst employed by the Employer, then the Employee agrees to compensate the Employer by payment of a sum equivalent to three times the annual renewal income which would otherwise have been due to the Employer in respect of that existing client or customer. Provided not more than 6 clients of our business become clients of

your future employer within 2 years of you leaving our employment, and you have not seek [sic] to solicit these clients then we will not seek to enforce the provision of this clause.

11.7.4 Notwithstanding clause 11.7.(1),(3) If at the commencement of the employees new employment with a new employer, and the new employer at that time, had an active financial planning client or Insurance client of Skerrett Investments Ltd, and provided not more than 6 clients of Skerrett Investments Ltd, become clients of your future employer within 2 years of you leaving our employment, and you have endeavoured not to solicit these clients, then we will not seek to enforce the provisions of clause 11.7.3 against you. (This “carve out” does not negate our rights under clause 11.1 and 11.2.) The waiver of this condition is implicit, that the new employer provides evidence of active financial planning or insurance advice and that the products of the client were recommended from that process.

Geographical Restraint

[25] Mr Churchman submits that there is some confusion about the geographical restraint in clause 11.7.1 and that the most sensible interpretation of the clause is that it relates only to clients in the Southland and Otago regions. He submits that that interpretation would put three of the clients relied on in the claim for damages outside of the Southland/Otago areas. He further submits that ambiguities in restraint of trade provisions are interpreted against the employer.

[26] Mr Towner, in his submission in reply, says that the respondent misconstrues the words *within the Southland and Otago region* in clause 11.7.1. He submits that they describe where the respondent was employed, not where a client resided and the respondent’s reference to the clients is misplaced. Mr Towner refers the Authority to two texts for guidance on interpreting a restraint of trade: Burrows, Law of Contract in New Zealand (4th ed) at para.13.9.7; and Brearley & Bloch QC, Employment Covenants and Confidential Information: Law, Practice and Technique (3rd ed) 2009, at paras.12.11/13 under the heading *The Courts’ approach to the interpretation of restrictive covenants*.

Conclusion

[27] If the words are clear and can only have one possible meaning and nothing in the surrounding circumstances requires modification of the meaning of the words, that should determine the matter: *Association of Staff in Tertiary Education Inc: ASTE Te Hau Takitini o Aotearoa v. Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491 at [19] and [24]. The words are not so clear in clause 11.7.1 that

they can only have one meaning. The words *within the Southland and Otago region* could refer to either the client or customer of the employer or the place of business of the employee. Non-solicitation/non-dealing clauses can though be without geographical restraint and simply refer to clients of the employer.

[28] Mr Broad's employment was primarily Dunedin-based and he also saw clients in parts of East Otago (evidence Warren Skerrett). The evidence did not support that Mr Broad was employed in the Southland as well as the Otago region. In light of that, an interpretation of the clause in accordance with business commonsense would support that the wider reference to *within the Southland and Otago region* was related to clients and customers with whom Mr Broad had any contact or dealing whilst employed rather than his place of employment.

[29] I agree with Mr Churchman's submission that that is the more sensible interpretation in all the circumstances and I so find. I shall return, if necessary, at a later time as to whether this interpretation impacts on the claim for damages.

Is the clause 11.7.1 a non-solicitation and non-dealing clause?

[30] Mr Churchman submits that it was not until the Authority's investigation meeting that it was understood WSIL was relying on clause 11.7.1 as both a non-solicitation and a non-dealing clause. He submits that it was unequivocally represented to Mr Broad at the time the employment agreement was entered into that the clause was only a non-solicitation clause and refers to document 10 in the common bundle. That is an email to Mr Broad from Mr Skerrett dated 29 July 2008. It copies into the email a description by Mr Yeo about clauses 11.7.1 and 11.7.3. Mr Yeo states, amongst other matters, that:

The clauses are not restraint of trade clauses, they are non-solicitation, non-poaching clauses and given the reality that all employee advisers will be given the opportunity to build relationships with clients as a result of their employment situation, the company needs to protect the goodwill built up through the payment of wages to the employee. If the employee has no intention of soliciting or poaching clients, the clauses should not be of any concern.

[31] Mr Churchman submits that it is now unconscionable and a breach of good faith for the applicant to say that the clause is also a non-dealing provision. He also submits that the heading of clause 11.7 *Non-solicitation of clients* creates ambiguity

and that the clause needs to be interpreted restrictively only as a non-solicitation provision.

[32] Mr Towner submits that the meaning of the restrictive covenant is primarily determined by words used and not earlier documents and that the restraint prohibits soliciting and carrying out of work of the same nature for any client or customer of the employer with which the employee has had any contact or dealing. He does not accept that clause 11.7 is ambiguous and says that it is document 10 that is ambiguous. He submits that what Mr Yeo was more likely doing in the email was distinguishing the restraint from the more onerous non-competition restraint of trade clauses. Mr Towner also relies on the entire agreement clause in the employment agreement.

Conclusion

[33] Mr Chong in his oral evidence said that the clause was a no dealing with clients provision and was therefore wider than simply non-solicitation. The first and the second amended statement of problem allege that Mr Broad undertook work for clients in breach of clause 11.7.1.

[34] The heading to the clause should not be read in isolation but as part of the entire clause. Although the heading does support that the nature of the restrictive covenant will be a non-solicitation clause, the clear words of clause 11.7.1 prohibit both soliciting and carrying out work of the same nature for any client or customer of WSIL with whom Mr Broad had contact or dealings whilst employed by WSIL.

[35] Mr Yeo confirms in document 10 that the clause will not apply if the clients are also clients of the employee's new employer when he/she commences employment. The clause was amended to reflect that when the final agreement was provided and signed. I find that reference is more likely to apply to the non-dealing as it does not sit as easily with non-solicitation of clients.

[36] I accept as submitted by Mr Towner that given there is reference again to the non-dealing provision in clause 11.7.3, it is less likely that it was inserted by error or mistake.

[37] I do not find that the Authority should interpret the words in clause 11.7.1 restrictively as a non-solicitation clause only because the clause, read as a whole

together with the heading, is clear and there is an entire agreement clause in the employment agreement. That said, clause 11.7.1 is a more onerous provision because it prevents Mr Broad from undertaking work for those who have previously been clients of WSIL even if they are not solicited and simply choose to follow Mr Broad to his new place of employment within a two year period. That is a matter that can be considered when reflecting on the reasonableness of the restraint itself.

Proprietary interests

[38] I am satisfied that Mr Broad, in his position, had access to information that was confidential about clients and influence over clients and customers of WSIL by virtue of his role when he worked for WSIL. That is a matter, I find, that could satisfy the reasonableness of a form of restrictive covenant to protect that relationship.

Duration of the restrictive covenant

[39] Mr Towner submits that the duration of the restraint of trade of two years is necessary for WSIL to establish the relationship with clients Mr Broad dealt with and that restraints in the financial advisory industry of that duration are very common. There was evidence that two years was a standard restraint period in the Grosvenor employment agreement.

[40] Mr Churchman submits that it is extremely rare for restraint of trade covenants in an employment agreement with a duration of two years to be lawful: *Walley v. Gallagher Group Ltd* [1998] 3 ERNZ 1153.

Conclusion

[41] I accept that there are cases where a restraint of trade covenant with a duration of two years has been held to be lawful but they have special or different features that I do not find exist in this particular matter.

[42] Mr Broad was subject to both a non-solicitation clause and a non-dealing clause. It prohibited him from soliciting clients and from undertaking work for those clients who approached him and wanted him to do work for them for a period of two years.

[43] Although in a different industry in the Employment Court judgment of *James Wells Patent and Trademark Attorneys v Snoep* [2009] ERNZ 284 the defendant was

restrained following termination of employment from practicing as a Patent Attorney for any of the employer's existing clients for twelve months. Judge Couch in determining the application for an interim injunction found at [32] the duration of the restraint was at the upper end of what was reasonable but not beyond that range.

[44] I do not find the two year restraint is reasonable for non-solicitation and non-dealing when considered both against other cases in this area and in light of the particular circumstances of WSIL. I find one year would be a reasonable upper limit of the restraint.

Consideration

[45] The applicants submit that there was consideration for the restraint of trade covenant. They submit that the parties were on 4 September 2008 when the employment agreement containing the restrictive covenant was signed still seeking agreement on Mr Broad's initial terms and conditions of employment. Mr Towner submits therefore that the employment agreement entered into on 4 September 2008 should not be viewed as a variation. Mr Towner refers the Authority to the legal position set out in Brooker's Employment Law para.CL2.04(1):

Where a restraint exists in a contract from the outset, consideration for the restraint will be found in the mutual exchange of promises between the parties and no extra consideration nor "premium" is required ... but where the terms of a settled employment relationship are varied by the introduction of a restraint of trade, it may be necessary to identify a distinct consideration for the variation.

[46] Mr Towner submits that this was not a settled employment relationship until the formal employment agreement was finally agreed in early September 2008. He submits that that employment agreement was in fact the parties' initial written employment agreement and not a variation of a previous contract. He further submits that the contents of that agreement had been a matter of discussion and negotiation for some time.

[47] In any event, Mr Towner submits that consideration for the restraint of trade was provided by any or all of the benefits that were agreed with the parties' agreement regarding clause 11.7. He refers to the offer of the employment agreement, the six client carve out from clause 11.7.3, redundancy compensation, study/examination leave and reimbursement of membership fees of a professional association.

[48] Mr Churchman submits that it is fundamental that a party seeking to introduce a restraint of trade must provide valuable consideration. He submits that Mr Broad had not been provided with an employment agreement at the time he started working for WSIL and that the subsequent tendering of an agreement is not an offer of employment. He further submits that, in order to amount to consideration, the terms in a new agreement must offer something of value to an employee more beneficial than an employee's existing terms and there was nothing more beneficial to the respondent in the 4 September 2008 agreement than what he was already entitled to in terms of his existing terms of agreement. Further, Mr Churchman submits the employment agreement is entirely silent as to any consideration.

[49] Mr Churchman refers to the Court of Appeal judgment in *Fuel Espresso Ltd* at [18] where it was stated:

What we are dealing with here is the initial (and only) agreement of the parties. The traditional definition of consideration requires that there be something of value which must be given, and that consideration is either some detriment to the promisee or some benefit to the promisor. But the law does not inquire into the adequacy of the consideration, nor, as the Judge seems to have thought, does it require an extra premium for a restraint of trade clause. It is also a very well settled principle of contract law that even mutual promises can be consideration for each other ...

[50] Mr Churchman refers to the judgment of the High Court in *C.E. Elley Ltd v. Gavin Burgess* (AP101/96). In that case the employer wanted to convert an employment agreement into a contract for services. At the time this was done, a restraint of trade clause was inserted. There was considerable argument in that case as to whether or not there was consideration for the clause. That there was no consideration was a matter that the High Court took into account in its conclusion that the discretion not to modify the contract under the Illegal Contracts Act 1970 was correctly exercised.

[51] Mr Churchman also referred to an Authority determination in *Provida Foods Ltd v. Davidson & Anor* (AA45/10, Member Monaghan). In that case, the Authority found that there were real benefits for Mr Davidson in signing the written employment agreement which added a restraint of trade provision. It was stated in that determination at [15]:

Had Mr Davidson been presented with and signed an agreement which effectively codified his existing terms and conditions, while adding a restraint of trade provision without any further corresponding benefit or promise in his favour, there would have been a failure of consideration. However, there were additional benefits associated with acceptance of the agreement inclusive of the restraint. In Mr Davidson's circumstances there were real benefits and it is not for the Authority to inquire into their adequacy.

Conclusion

[52] Initially it appeared from the pleadings and evidence that WSIL's position was that Mr Broad was not employed by the company until 4 September 2008. Mr Towner's submissions in reply do seem to make it clear that WSIL accepted Mr Broad had already started work for the company before the employment agreement was signed on 4 September 2008 (para.19). In the event that is not conceded, I find Mr Broad commenced employment with WSIL when it purchased the Broadbase business some four months before the employment agreement containing the restraint of trade was signed on 4 September 2008.

[53] The 4 September 2008 agreement provides that Mr Broad's employment shall commence on 1 May 2008. It is convenient to take that as the date Mr Broad commenced his employment with WSIL. It was always intended that WSIL and Mr Broad would enter into a new employment agreement and negotiations took place with a view to concluding one. It was also agreed that until a new agreement was concluded, Mr Broad's current terms and conditions of employment were to be honoured.

[54] The restraint of trade clause was not presented to Mr Broad in a proposed employment agreement by WSIL until June 2008, after Mr Broad's employment with WSIL had commenced. It was at least two months after that time before negotiations for the employment agreement concluded and it was signed. I do not find, in those circumstances, that the employment agreement signed on 4 September 2008 can be described as an offer of employment.

[55] I find that the employment agreement dated 4 September 2008 is more properly seen as a variation rather than an initial employment agreement. It is most likely that Mr Broad, in the absence of reaching agreement with WSIL about his terms

and conditions of employment, could have simply remained on his existing terms and conditions.

[56] Mr Broad said in evidence under questioning from the Authority that he signed the agreement with WSIL because he felt vulnerable and that he was told there would be no further negotiations and it was a *take it or leave it* situation although there was no claim that it was signed under duress as such. Mr Broad did have an opportunity to obtain advice if he had chosen to do so. Mr Skerrett's written evidence was that after negotiation and the six client carve out Mr Broad was happy to sign the new employment agreement.

[57] Objectively assessed the emails at the time of negotiation do support that it was important for WSIL that Mr Broad agree to a restraint of trade. The fact that Mr Broad did not immediately agree to what was proposed did seem to create some suspicion on the part of Mr Skerrett as to the reason why - document 9 which is an email to Mr Yeo dated 28 July 2008. I conclude that it would have been clear to Mr Broad that his employer wanted him to sign an agreement with a restraint of trade.

[58] Mr Towner submits that consideration was provided by the offer of the employment agreement which was signed, the six client carve out from clause 11.7.3, redundancy compensation, study/examination leave and reimbursement of membership fees of a professional association. He submits that the real issue is not whether such employment benefits were part of the respondent's terms and conditions of the previous employment but whether the first applicant had offered to provide those benefits to the respondent on commencement of his employment with the first applicant. Mr Towner submits that these employment benefits had not been agreed to at the point in time at which the respondent commenced employment with the first applicant. I have found that it was intended that a new employment agreement be negotiated but until new contract conditions were agreed on there was a commitment to honour Mr Broad's existing employment agreement conditions from when he commenced employment with WSIL.

[59] Mr Skerrett was already employed by WSIL so the new agreement cannot be seen as an offer of employment. The next matter relied on is the carve out of six clients from the restraint obligations. I accept that this came about through negotiation between Mr Broad and WSIL. This matter could not I find be seen as something of value however in circumstances where Mr Broad had not had an earlier

restraint of trade clause. I also accept Mr Churchman's submission that the study/examination and membership fees seem, on their face, to be inferior provisions to what Mr Broad had in his employment agreement at the time he signed the 4 September 2008 agreement.

[60] That then leaves the redundancy provision. I accept Mr Towner's submission that redundancy compensation was defined in the September 2008 agreement as two weeks compensation after twelve months of employment. Mr Broad was entitled to redundancy compensation at the time he signed the 4 September 2008 agreement under his existing terms and conditions but the sum to be paid was undefined and was to take into account three matters. Having considered the issue of redundancy carefully I prefer Mr Churchman's submission that although a different clause in the 4 September employment agreement it is arguably no better than what Mr Broad already had.

[61] I do not find that there were real benefits; something of value for Mr Broad, in agreeing to a variation to his employment agreement which included the restraint of trade. This is a matter that can be taken into account in reaching conclusions as to the reasonableness and enforceability of the restraint.

[62] Mr Churchman has also referred to the liquidated damages provision in clause 11.7.3 as being a fundamental impediment to a finding of reasonableness as it is a penalty. In the main this is an issue more appropriately left for consideration if the Authority gets to the point of finding breach and then considering damages under clause 11.7.3. Mr Broad was a fairly modestly paid employee of WSIL. By virtue of the formula in clause 11.7.3 if, after termination of his employment, he solicited or carried out work of the same nature for any client or customer of WSIL he agreed to pay three times the annual renewal income in respect of that existing client or customer. That was the same formula in the sale and purchase agreement between Broadbase and WSIL although the relevant period of restraint was five not two years in the sale and purchase agreement. There had though, under the sale and purchase agreement, been a substantial payment made to Broadbase by WSIL.

Conclusion as to the reasonableness of the restraint

[63] I have found that there was a proprietary interest that would have justified a form of restraint to protect client relationships. I find however that the restraint of trade is not reasonable.

[64] The duration for the restraint is too long. There was some modification and concession about the restraint of trade clause before the 4 September agreement was signed with the six client carve out. There was no such concession with the duration of the restraint of trade. That was more likely simply set by what was in other employment agreements because the evidence from Mr Chong supported that the restraint of trade was a standard clause used for financial advisors in Camelot. WSIL was aware that Mr Broad had no such restraint clause in his existing employment agreement and that Mr Broad proposed a much shorter duration of six months (document 9 common bundle). I have found that one year would be the reasonable upper limit for the non-solicitation and non-dealing clause.

[65] The Authority is further not satisfied that there was consideration provided for the restraint of trade introduced in the September 2008 employment agreement.

[66] The restraint of trade in clause 11.7.1 is unreasonable and unenforceable. The Authority has been asked to exercise its discretion under s 8 of the Illegal Contracts Act 1970 and modify the provision so as it would have been reasonable at the time the contract was entered into and give effect to the contract as modified. Before I consider the exercise of that discretion I want to firstly determine whether Mr Broad's employment agreement and the benefit of the restraint of trade was assignable to Camelot and in fact was assigned.

Is the benefit of Mr Broad's restraint of trade capable of being assigned and was it assigned to Camelot?

[67] WSIL sold its business to Camelot pursuant to a sale and purchase agreement dated 30 September 2009. It says that it assigned its rights, including those protections in relation to its employment agreement with Mr Broad, to Camelot under the sale and purchase agreement within the definition of *business agreement* in the sale and purchase agreement. It says that there is no reason why Mr Broad should be released from his obligations under the restraint of trade simply because the business

was sold and that the business and underlying proprietary interest still existed and needed protection.

[68] Mr Towner submits that the full Court of the Employment Court in *PGG Wrightson Ltd v Jary* [2008] ERNZ 476 recognised that in some cases, the benefit of a restraint of trade contained in an employment agreement may be capable of assignment. Therefore he submits it is not for the Authority to revisit that settled proposition of law but to determine on the facts of this dispute whether the restraint of trade provisions were in fact assigned.

[69] Mr Towner states that the ability to assign restrictive covenants found in *Jary* is supported by overseas texts. Alexandra Kamerling and Christopher Osman, Restrictive Covenants under Common and Competition Law (5th ed, Thomson Sweet & Maxwell, London, 2006) para 3.6: *there is no doubt that the benefit of a restrictive covenant can be assigned in accordance with normal contractual rules. It most frequently happens in the employment context after the first employer has sold his business.* JD Heydon, The Restraint of Trade Doctrine (3rd ed, LexisNexis Butterworths, New South Wales, 2008) p 187: *The benefit of a valid covenant over an ex-employee may be assignable under the normal contractual rules.*

[70] Mr Churchman does not agree with Mr Towner that there is a settled proposition of law in the employment jurisdiction of New Zealand about the assignment of an employment agreement including the benefit of a restrictive covenant. He says that there has been an overstatement of what *Jary* actually decided.

[71] Mr Churchman submits that it has been settled law in New Zealand for many years that a contract involving personal skills and confidence is not assignable – *Post Haste Couriers Limited v Casey* (unreported, High Court Invercargill, 24 October 2009) Holland J and *Castle Parcels Limited v Dale and others* (unreported High Court Auckland, 28 November 1988). He submits that the employment agreement entered into between Mr Broad and WSIL had the qualities of one involving personal skill and confidence.

[72] Mr Churchman submits that it is important to focus on what the law in New Zealand is and not on what it may be in other jurisdictions who do not have the same statutory framework as New Zealand with the unique mutual good faith obligations. He submits that the employment agreement makes it clear that it is one personally

involving Mr Broad. He submits the employment agreement does not naturally fit within the definition of business agreement in the sale and purchase agreement and that an employee is *not some kind of chattel or fitting to be transferred at the whim of the employer*. Further he says that the more important obstacle unlike other cases is that at the time of the claimed assignment the employment relationship between WSIL and Mr Broad had ceased to exist.

Conclusion

[73] It is helpful to set out the first question in *Jary* that the parties had agreed to ask the Court to answer which arose from what the Court stated were limited facts:

On the agreed facts of this matter, was the benefit of the covenant in the restraint of trade contained in the individual employment agreement assignable to the purchaser of the business and enforceable by that purchaser when the vendor of the business had made the employee bound by the restraint redundant?

[74] It is clear at [9] of the judgment that each counsel sought to persuade the Court that there were essential principles that could be applied generally in these circumstances. Authorities and texts were referred to. The Court found at [15] and [16] that because of their nature the cases relied on were of limited value. Some were dealing with applications for interim relief, the covenants in the cases arose out of many different relationships not simply those of employer/employee and employment law had developed considerably since some cases had been decided. It was further found that the substantive judgment of the High Court in *Post Haste Couriers* turned on its own facts rather than any general principle. Ultimately the Court stated on the limited facts available it was unable to reach any useful decision on the principal issue in the case and declined to answer the first question.

[75] The Authority in an interim injunction application also considered the issue of assignment of the benefit of a restraint of trade in *Precision Tracking (NZ) Limited v Jeffrey Tait* CA 216/09, 16/12/09. The Authority followed *Jary* to conclude an arguable case but stated *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*.

[76] I prefer Mr Churchman's submission that the issue of the assignability of the benefit of a restrictive covenant in an employment agreement in the employment jurisdiction in New Zealand has not been affirmatively resolved. I do not therefore as Mr Towner submits simply accept that the restraint of trade covenant in the employment agreement between Mr Broad and WSIL is assignable before moving to the next question as to whether it was actually assigned. It is necessary to start by examining the employment agreement between WSIL and Mr Broad to see if it is capable of being assigned. It is my view this would always be a necessary first step.

[77] There has been a general principle in New Zealand that contracts involving personal skill or confidence cannot be assigned, at least not without consent -*Post Haste Couriers Limited* and *Castle Parcels Limited*. Mr Towner refers to overseas texts to support that there can be assignment of a restrictive covenant but in New Zealand this needs to be considered against the framework of the Employment Relations Act 2000 and the object of the Act with the promotion of good faith in all aspects of the employment environment and relationship.

[78] I am satisfied that the employment agreement between Mr Broad and WSIL did involve personal skill and confidence. WSIL could require Mr Broad to perform his obligations under the employment agreement and Mr Broad could require WSIL to perform its obligations under the employment agreement.

[79] In *Post Haste* on pg 12 there is reference to a statement in Cheshire and Fifoot Law of Contract 7th edition where the author says *the benefit of a contract is only assignable in cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it*. A similar statement also appears in the successor to Cheshire and Fifoot's Law of Contract in Burrows Finn and Todd Law Of Contract 4th edition at 17.1.8. *Post Haste* concerned a courier engaged under a contract for services and this statement is about purely contractual relationships.

[80] However the Employment Relations Act 2000 (the Act) provides that the employment relationship is between employer and employee and in some circumstances the union - s (4) (2) of the Act. It would be an important difference for either employee or employer if the obligations under the employment agreement were to be discharged for another party. Mr Churchman submits correctly the Employment Relations Act 2000 does not refer to assignment of employment agreements to some

person other than the employer or employee. It is important that Mr Broad under clause 15.2 of the employment agreement was specifically required to personally perform his duties and responsibilities and no assignment or subcontracting was permissible.

[81] It would seem inconsistent with good faith requirements in the Act if there was an assignment of an employee's obligations under an employment agreement to a third party without the knowledge or consent of the employee. Mr Broad did not consent to, and had no knowledge of, the assignment.

[82] There was nothing in the employment agreement between WSIL and Mr Broad objectively assessed to suggest that either party intended that it could be assigned. Given the personal relationship contemplated by the employment agreement I have placed less weight on Mr Towner's submission, whilst correct, that the employment agreement does not prevent assignment. It would be unlikely in my view that if that was intended by WSIL and Mr Broad the employment agreement would not address a situation. As earlier referred to in this determination clause 15.3 of the employment agreement provided; *Each party acknowledges that this agreement contains the whole and entire agreement between the parties as to the subject matter of this agreement.*

[83] The employment relationship between WSIL and Mr Broad had ended on 29 July 2009 well before the agreement for the sale of the business was entered into between WSIL and Camelot on 30 September 2009. This was a different situation to that in *Jary*. Mr Towner submits correctly that restraint of trade provisions in an employment agreement invariably survive the end of the employment relationship but it is even more significant in those circumstances that the employment agreement does not provide the benefit of a restraint of trade can be assigned to another party in circumstances where the employment relationship between WSIL and Mr Broad has been terminated.

[84] I now turn to the agreement for sale and purchase of the business (SPA) between WSIL and Camelot and Camelot NZ Management Limited. There is no specific reference to employment agreements in the SPA. Mr Towner submits that Mr Broad's employment agreement with WSIL is a business agreement which definition is wide enough within the SPA to include the employment agreement. He also relies on the definition of assets meaning tangible and intangible assets and say

that it is clear from the SPA that the title and rights in the intangible assets which include business agreements, passed to Camelot on 30 September 2009. Business Agreement is materially defined in the SPA as meaning *all deeds, arrangements, agreements or understandings entered into by the Vendors and relating exclusively to the operation of the Business to the extent that the same have not been performed at the close of business on the Completion Date set out in Schedule 3 to this Agreement (including the Lease),....*

[85] An employment agreement is not usually regarded as a business agreement, but even if the employment agreement could be said to fit within the various definitions in the SPA the employment agreement was one that was at the time of the sale of WSIL's business at an end. That is a significant difficulty. There are two further difficulties.

[86] I have found the employment agreement involved personal skill and confidence on the part of WSIL and Mr Broad and there is nothing in the employment agreement itself objectively assessed to support that the parties intended that any obligations in the employment agreement be assigned, at least not without consent. I am not satisfied that the benefit of the restraint of trade could be assigned to Camelot in those circumstances regardless of what the SPA said.

[87] The second difficulty follows on from the first. Clause 8.1 of the SPA provides that WSIL must use all reasonable endeavours to assign its rights and interests under the Business Agreements and to obtain the consent (where necessary) of the other parties to such assignment by completion. If the definition of business agreements includes the employment agreement of Mr Broad then it was necessary for WSIL under clause 8.1 to obtain Mr Broad's consent and or use its reasonable endeavours to do so. WSIL did not use any endeavours to do so although the clause states that is a requirement.

[88] I am not satisfied for the above reasons the benefit of the restrictive covenant in the employment agreement between WSIL and Mr Broad was capable of being assigned to Camelot. It was therefore not assigned to Camelot and is not able to be enforced by Camelot. Camelot's application was on the basis that there was an assignment of the benefit of the restraint in trade which it could enforce. The claim by Camelot is therefore dismissed.

Modification under the Illegal Contracts Act 1970

[89] I return to the issue of whether the Authority should modify clause 11.7.1 of the employment agreement between WSIL and Mr Broad under s 8 of the Illegal Contracts Act 1970 so that it would have been reasonable at the time the employment agreement was entered into so effect can be given to it.

[90] Section 8 requires the exercise of a discretion. In *M A Watson Electrical Ltd v Kelling* [1993] 1 ERNZ 9 Justice Smellie on page 17 referred to how the discretion under s 8 should be exercised; *Clearly what is called for, however is a careful, balanced, judicial appraisal of what is required to reach a fair and reasonable result.*

[91] I have considered what is required to reach a fair and reasonable result and I am not prepared to exercise my discretion and modify the restraint provision. These are my reasons.

[92] The first is my findings about consideration at the time of the variation of Mr Broad's employment agreement. I have not found something of value for Mr Broad in agreeing to the restraint of trade covenant.

[93] The second is the historical nature of the proceedings against which the Authority in the exercise of its discretion must apply the requirements of s 164 of the Employment Relations Act. Section 164 provides that the Authority may only make such an order under s 162 of the Act cancelling or varying an individual employment agreement if it has identified the problem in relation to the agreement and has directed the parties in good faith to resolve the problem. The Authority must be satisfied they had attempted to do that in good faith by using mediation and despite that it remains unresolved and any remedy other than such an order would be inappropriate or inadequate. In short the Authority cannot make the requested order to modify the restraint of trade unless it is satisfied the requirements of s 164 have been met.

[94] The statement of problem was first lodged with the Authority on 15 July 2010 naming WSIL as the only applicant. It confirmed that mediation had not been attempted by the parties before the original statement of problem was lodged because there were significant issues of law that required determination. The parties did however attend mediation in September 2010. A letter to counsel from the senior support officer dated 18 August 2010 supports that attendance at mediation was by referral rather than direction. The Authority had not identified at that time any

problem in relation to the employment agreement under s 164. The senior support officer records a telephone call was received from Mr Towner on 13 December 2010 to the effect that the matter was unresolved and a telephone conference with the Authority was required. Both counsel were available for a telephone conference in early February 2011 and the matter was set down for an investigation meeting in early June 2011 with no further reference to mediation in the notice of direction or indeed subsequently.

[95] The period of restraint under clause 11.7.1 ended in July 2011. That alone would not mean the discretion could not be exercised in favour of modification. There are other factors though. WSIL requested an adjournment of the investigation meeting scheduled in June 2011. That was granted. WSIL was removed from the company register from 21 November 2011 and remained so until the Authority noticed this to be the case in early 2013 after investigation meeting dates had been set for June 2013. The Authority advised counsel that until the first applicant was reinstated to the company register WSIL could not take further steps in the procedure. The first applicant was duly reinstated to the company register on 20 May 2013. There were in the interim, that is between June 2011 and June 2013, a number of preliminary issues and reasons for delay which I do not intend to traverse.

[96] The Authority is not satisfied that it should direct WSIL and Mr Broad to mediation to resolve the problem with the restraint of trade covenant in the employment agreement after the expiration of four years from the date the employment relationship terminated and two years since the restraint period ended. The Authority has taken into account that WSIL was only reinstated to the company register very recently so it could take part in the investigation meeting but is effectively a shell company. The fact that WSIL was struck off for a long period whilst various applications were made in its name suggest to the Authority that the matter was largely driven by Camelot.

[97] I decline to exercise the discretion under s 8 of the Illegal Contracts Act 1970 to modify clause 11.7. The result is that clause 11.7.1 in the employment agreement is unenforceable.

[98] WSIL did not rely solely on the restraint clause. There are two other causes of action being the breach of clause 4.2 consistent with the implied duty of fidelity and

the confidentiality obligations in clause 11.7.2. The Authority will go onto determine those matters.

Was there a breach of clause 4.2 of the employment agreement by Mr Broad?

[99] WSIL says that Mr Broad breached clause 4.2 of his employment agreement. Mr Towner submits that clause 4.2 is consistent with the implied duty of fidelity. I agree.

[100] Clause 4.2 is headed *Obligations of the Employee* and provides as follows:

The Employee shall:

- (i) *Comply with all reasonable and lawful instructions provided to them by the Employer;*
- (ii) *Perform their duties with all reasonable skill and diligence;*
- (iii) *Conduct their duties in the best interests of the Employer and the employment relationship;*
- (iv) *Deal with the Employer in good faith in all aspects of the employment relationship;*
- (v) *Comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer from time to time.*
- (vi) *Take all practicable steps to perform the job in a way that is safe and healthy for themselves and their fellow Employees.*

[101] WSIL say that Mr Broad breached clause 4.2 in a number of ways. It alleges that whilst still employed by WSIL Mr Broad contacted selected clients and informed them of his plans to leave WSIL and laid the foundation for the future transfer of their business to him at Broadbase Central and unsuccessfully solicited a client of WSIL Ray Hopkins. Eleven clients transferred their business whilst Mr Broad was still employed by WSIL but after he had given his notice of resignation. It is also alleged that whilst an employee on 30 March 2009 Mr Broad criticised WSIL's decision to make the office manager redundant and, on 23 June 2009 had contact with Mr Valentine and showed himself knowledgeable about Broadbase affairs. It is further alleged that Mr Broad took steps to isolate clients.

[102] Mr Towner refers to the case of *Shilling v Kidd Garrett Limited* [1977] 1 NZLR 243 (CA) and submits that undermining an employer's business relationships with clients with a view to the future transfer of that custom to the employee is a recognised breach of the duty of fidelity: *SSC & B; Lintas New Zealand Ltd v Murphy* [1986] 2 NZLR 436 (HC); *BFS Marketing Ltd v Field* [1992] 2 ERNZ 1105 (EmpC).

[103] I will start with the alleged breach that Mr Broad, while an employee of WSIL, contacted selected clients and informed them of his plans to leave the first applicant and laid the foundation for the future transfer of their business to him at Broadbase. WSIL say that 11 clients transferred to Broadbase Central between the date of notice of resignation being given and the end of the notice period and one other very shortly before the commencement of the notice period.

[104] Mr Broad says in his written evidence at [28] that he left WSIL because the company gave him no assistance or support in his role with them. He says that this manifested in a lack of support for his university studies and also in the accommodation and travel expenses that he had to personally incur on behalf of WSIL. Mr Broad denies any involvement with Broadbase Central prior to his resignation from WSIL. Mr Broad said in evidence and there was nothing to suggest otherwise that he had no equity interest in Broadbase Central and was paid a salary. He said he had no shareholding and no intention of a shareholding with the company.

[105] The evidence of Malcolm Papworth is relied on by WSIL. Mr Papworth said that on 29 June 2009 he spoke to a client of his who was also a client of WSIL in his capacity as trustee of his father's trust. Mr Papworth said that the client advised him that he had heard Mr Broad was leaving WSIL and going to Broadbase Central. The client then said that Mr Broad had called his sister who was also a trustee of the trust and asked her if she would consider transferring the trust's business to Broadbase Central. Mr Papworth said that he then advised Mr Skerrett of this and his view that Mr Broad was poaching clients. Mr Broad denies that he spoke to a client in this manner. The Authority did ask Mr Papworth for the name of his client and although initially reluctant he did give the name of the client. There was no direct evidence from Mr Papworth's client or his sister.

[106] Mr Skerrett said that he received a call from Mr Papworth about his concerns before he received notification that Mr Broad was resigning. Mr Broad explained that he had written his resignation letter on 29 June 2009 and posted it to Mr Skerrett.

[107] If the Authority was satisfied from the evidence that Mr Broad made the contact with the client of WSIL that Mr Papworth described then it would have been a breach of his obligations in clause 4.2. Mr Churchman in submissions suggests that Mr Papworth was not an impressive witness. The more fundamental difficulty with the evidence Mr Papworth gave to the Authority about Mr Broad's actions is that it is hearsay evidence. Mr Papworth said that he was told by his client about a conversation his client's sister had with Mr Broad. The Authority in those circumstances simply cannot be satisfied as to the reliability of Mr Papworth's evidence unless there is some other consistent evidence. I have therefore considered some correspondence shortly after 29 June 2009.

[108] On 1 July 2009 Mr Skerrett emailed Mr Broad. If his evidence is accepted this was after his conversation with Mr Papworth and before he knew of the resignation of Mr Broad. The email which was copied to Mr Chong and Mr Yeo commenced with a statement that *Don there is already a rumour that you are teaming up with Ross Valentine*. It then sets out that the property of Camelot and their clients belongs to Camelot unless agreed otherwise. Then Mr Skerrett said in his email *I have respect with you on this....* although he goes on to express doubt about other business people when taking on employees with expectations of bringing clients with them. He ends by saying *will talk on this a bit later*. There was no particularly clear evidence from either Mr Skerrett or Mr Broad, perhaps not surprisingly given the passage of time, as to what if any discussion took place in respect of the *talk later* comment. Mr Broad said that he had no firm plans at that time with work and he would have refuted that he was going to work with Ross Valentine. He did not accept in his written evidence that as described by Mr Papworth he had contacted a client and attempted to solicit their business.

[109] If Mr Skerrett had heard from Mr Papworth about the client of WSIL being approached by Mr Broad with a view to soliciting their business before that email was sent then it is somewhat surprising there is no mention of that. Mr Broad was still an employee of WSIL at that time and if there was information to support that he had contacted one of WSIL's clients in an attempt to solicit their business then that was very serious. It is also surprising that Mr Skerrett in those circumstances would have told Mr Broad that he had respect with him about the property/clients of Camelot. Even if there was an explanation for those matters there is nothing said in the more formal letter of 3 July 2009 from Mr Skerrett to Mr Broad which letter acknowledges

Mr Broad's resignation and sets out the obligation he has in his employment agreement. That letter I imagine would have followed the talk referred to earlier. Mr Broad was placed on garden leave for the balance of his notice period from 3 July 2009. He was provided access to the Custodial system so that he could deal with selected clients and did undertake a client visit and reported back to Mr Skerrett about that. That is again surprising if there was a suspicion solicitation had already taken place.

[110] I cannot be satisfied in all the circumstances from Mr Papworth's evidence that Mr Broad breached his obligations under clause 4.2 of his agreement in the way alleged.

[111] There is also reliance placed on contact with another client Helen Richardson and her knowledge that Mr Broad was going to Broadbase from July 2009. The Authority did not hear from Ms Richardson but in the common bundle at 47 there was a completed questionnaire Ms Richardson signed on 13 September 2010 at the request of WSIL/Camelot. Ms Richardson was asked at question 3 what date she learnt about Ross Valentine and/or Broadbase and their products and answered *June/July 2009*. She was then at question 4 asked *If Ross Valentine or an employee of Broadbase or Mr Broad did not mention Ross M Valentine or Broadbase to you, who did so?* and she replied *no-one*. She was then asked in question 5 what date that occurred and how and she responded *mid-October 2009 - visited by Don Broad*. She was then asked under question 6 when she learnt Mr Broad was starting employment with Ross Valentine or Broadbase and she replied *July 2009* and then that she was aware of this because of a visit and no follow up letter.

[112] I accept Mr Churchman's submission that there are some inconsistencies from a careful examination of Ms Richardson's questions and answers. Mr Broad said that he received a call out *of the blue* from Ms Richardson querying whether he had received a birthday card from her on 14 October 2009. Mr Broad had not received the card. Mr Skerrett confirmed in his evidence that a 50th birthday card had been sent for Mr Broad to WSIL from Ms Richardson and not forwarded on. It would suggest that at that time September/October 2009 Ms Richardson did not know where Mr Broad was employed because she was sending a birthday card for him to WSIL. That is inconsistent with her questionnaire that she learnt he was starting employment with Ross Valentine or at Broadbase from July 2009. The other matter I am mindful of is

that at Mr Skerrett's request in early July 2009 Mr Broad sent out a letter to all clients confirming his resignation and advising that Mr Skerrett would be taking over his position. The letter endorsed Mr Skerrett as an advisor and in it Mr Broad urged his clients to use him. That may have influenced Ms Richardson's thinking about when/how she became aware of Mr Broad's employment at Broadbase Central and the reason for the date in July 2009. Mr Broad signed the letter so that would have come from him in her eyes. At least I cannot rule that out. Ms Richardson did not transfer her accounts to Broadbase Central until October 2009 which was after Mr Broad's employment with WSIL and his duty of fidelity had ended.

[113] I am not satisfied from the evidence that there was a breach of clause 4.2 by Mr Broad in his dealing with Ms Richardson whilst he was an employee of WSIL.

[114] Reliance is also placed on an interaction between a client of WSIL Ray Hopkins and Mr Skerrett on 14 July 2009. Mr Hopkins as a client of WSIL had had contact with Mr Broad about his account 3 or 4 times whilst he was employed at WSIL. Mr Hopkins had been a Broadbase client from 2003 before the business was sold to WSIL and then to Camelot. Mr Hopkins gave evidence of a chance encounter with Mr Broad in an electrical repair services shop in South Dunedin. He said that Mr Broad advised him he was leaving Camelot to join with Ross Valentine. There was a discussion about fees and Mr Hopkins said that Mr Broad stated that he would be using exactly the same system that Broadbase Otago had used when he had originally opened his account with Bruce Wood. He said that Mr Broad insinuated that he could offer the same fee arrangement if he agreed to join him at *Ross Valentines*. Mr Hopkins felt it was a bit unethical that Mr Broad tried to persuade him to shift his business from Camelot and he mentioned this to Mr Skerrett in August 2009. Mr Hopkins signed a file note on 5 November 2009 and then swore an affidavit on 20 January 2010.

[115] Mr Broad agreed that he had met up with Mr Hopkins in the shop. His evidence was that he explained his recent job movements but that was the extent of any discussion about Broadbase Central. I accept Mr Towner's submission that this would tend to support that Mr Broad had already accepted an offer with Broadbase Central or knew employment with that organisation was likely. Mr Broad in his evidence said it was not until early August 2009 that an offer was accepted. There was no evidence to suggest that Mr Broad actually commenced employment with

Broadbase Central before the end of August 2009. Mr Broad denied soliciting Mr Hopkins's business and said that Mr Hopkins mentioned WSIL was continuing to pressure him to move his business from the Aegis to the Grosvenor platform. By way of brief background Mr Skerrett favoured a client management system called Grosvenor to the system Broadbase used, Aegis. It was common ground that Mr Broad preferred Aegis. There was a push by WSIL to move as many clients as possible onto Grosvenor. Mr Broad said that he told Mr Hopkins he was on a good deal with Aegis and needed to be careful not to be disadvantaged by moving systems. Mr Broad suggested that Mr Hopkins may have been confused by that discussion and the mention at the start of the conversation of Broadbase Central.

[116] Mr Hopkins' evidence was largely unshaken under cross examination by Mr Churchman. He denied that WSIL pressured him to move his investments although accepted that he probably discussed with Mr Broad the different investment platform on 14 July. He was I find a credible witness and I accept that he thought after the conversation with Mr Broad that Mr Broad was insinuating he transfer his business from WSIL to Broadbase Central and he would get the same fee structure. I have considered Mr Broad's explanation that there could have been some confusion on the part of Mr Hopkins because he mentioned Broadbase Central at the start of the conversation. I find that less likely having considered the events and the evidence of Mr Hopkins. Mr Broad had a duty at the time of the conversation toward WSIL as he was still an employee to not behave in a way that was not in the best interests of WSIL.

[117] I find it more likely than not that there was either an attempt indirectly to solicit Mr Hopkins custom and/or that Mr Broad did not act in the best interest of WSIL by expressing his concerns about Mr Hopkins shifting from one system to another. He should have suggested to Mr Hopkins that he discuss that with Mr Skerrett and that should have been the extent of the conversation. As it transpired Mr Hopkins did not transfer his account to Broadbase Central. There was no evidence of any further attempts by Mr Broad to talk to Mr Hopkins. Whilst I have found a breach it did appear be a one off unplanned encounter without follow up or further interaction. There was I find a breach of the obligations in clause 4.2 by Mr Broad in his interactions with Mr Hopkins but there is no issue of damages in the circumstances.

[118] There is another client referred to, Mr Hill. The Authority did not hear from Mr Hill but the documentary evidence supports that he did not transfer to Broadbase Central until well after Mr Broad's employment and his duty of fidelity to WSIL had ended. Mr Hill in his note dated 12 September 2010 at 36 of the bundle does not state that he was solicited by Mr Broad. That is in conflict with Mr Skerrett's email to Mr Chong of 7 September 2009. The Authority could not in those circumstances resolve that conflict without hearing evidence from Mr Hill.

[119] In the absence of any direct evidence from the 11 clients that left prior to Mr Broad giving notice but before his employment terminated Mr Towner submits that the Authority should draw an inference from the evidence of Mr Hopkins, Ms Richardson, Mr Papworth and Mr Hill, and all the other circumstantial evidence that Mr Broad solicited the 11 clients. He submits that it cannot be a simple coincidence that 11 clients transferred to Broadbase Central following Mr Broad's resignation but before his employment ended. He submits that the inference is strengthened by the fact that none of the seven clients who transferred within the 18 month period before Mr Broad had plans to go to Broadbase Central went to Broadbase Central. Although Mr Churchman indicated that in fact one client had left and had gone to Broadbase Central a week prior to Mr Broad giving notice of his resignation Mr Towner submits even allowing for that one client it is still not coincidence.

[120] Mr Towner refers the Authority to definitions of circumstantial evidence in Halsbury's Law of England (5th ed, 2010, online ed) Vol 28 Criminal Procedure at [462] and Cross on Evidence. He also refers to a judgment of the Hong Kong High Court in *Deacons v White & Case LLP* [2003] 3 HKLRD 670 at [168] where there was no direct solicitation of clients but it was held that given the sequence of events there was sufficient evidence of what was intended to infer that the solicitation had taken place.

[121] The departure of 11 clients within this period to what was to become Mr Broad's new employer Broadbase Central, gave very real reason for Mr Skerrett to have suspicion that it was because of Mr Broad's actions. That is understandable and I do not find that the suspicion in those circumstances against what actually occurred can be dismissed immediately as Mr Churchman submits as conjecture and speculation. It requires careful consideration.

[122] It became apparent from the evidence and the documentation that there were reasons why clients of WSIL became unhappy with WSIL. I shall explain that shortly. I also need to consider why all 11 clients went to Broadbase Central as opposed to some other financial advisor. I'll consider each client separately. There is a list of accounts transferred to Broadbase Central at tab 13 of the bundle. I have considered that and the clients that transferred before Mr Broad's employment with WSIL terminated.

[123] Mr and Mrs Such made a request to transfer to Broadbase Central on 22 June 2009. They do appear in tab 13 although before Mr Broad gave notice of his resignation. I have considered, in the bundle of documents at tab 18, a letter from Mr Such in which he sets out his reasons for transferring to Broadbase Central. In his letter he states that he lost confidence in Camelot when during question time at a meeting on 9 June 2009 he asked Mr Skerrett about the future of the Camelot Dunedin office because he felt it was being run down. Mr Such was not happy with Mr Skerrett's response that he could discuss the matter by cell phone with him or could contact Bruce Wood the previous owner. Mr Such said in his letter that he lost confidence in Camelot to look after their investments and then looked for another locally based advisor. He knew Ross Valentine and friends had also dealt with him satisfactorily. It was decided then by Mr and Mrs Such to place the portfolio with Mr Valentine. Mr Skerrett accepted that there was a marketing seminar and questions about the future of the Dunedin office in his written evidence in reply at [19].

[124] The next clients of WSIL in date order to request a transfer were the Hargers. They had investments under both the Aegis and Grosvenor platforms. They appear to have been entered and counted twice in tab 13 because there are two different transfer dates for each investment although they are one and the same client. The first transfer of an account is on 29 June 2009. The second is on 5 July 2009. Both the Hargers signed a letter found at tab 20 of the bundle which is not dated. In that letter they explain that they became uneasy in late 2008/2009 about Mr Skerrett's attitude. They then write that in January and April 2009 they received portfolio valuations direct from Camelot that were clearly incorrect and that further undermined their confidence in Camelot and Mr Skerrett. What finally led them they write to look for another financial advisor was the termination of Liz Heseltine's employment [for reason of redundancy when it was decided all administration would be done from Invercargill]. They describe Ms Heseltine as working for Broadbase Otago for many years and as a

very competent administrative assistant and office manager. They found that after she left their calls were answered in Invercargill. Mr Harger, the letter set out, explored alternative financial advisors in May and in June made an appointment to see Mr Valentine at Broadbase Central and it was agreed to transfer the portfolio to him. It was some weeks later they wrote that they heard Mr Broad was leaving WSIL and they were pleased when they discovered he was joining Ross Valentine at Broadbase Central in September.

[125] There were then four client requests to transfer their accounts to Broadbase Central dated 5 July 2009. The first was the Hargers already dealt with above being a transfer of an account under a different investment platform.

[126] The second in the list of accounts at tab 13 on 5 July was from T Edgar and J Parkinson. T Edgar and J Parkinson both signed a letter dated 7 September 2010. They said in the letter that their decision to leave Camelot and move their account to Broadbase Central was because they knew Don Broad. They wrote that they were not asked by him to move the account and that he simply stated that he was leaving Camelot. They also referred to their view that the Dunedin office was being run down and the departure of Ms Heseltine.

[127] The third request is from AR and KM McNeish. There is a diary note dated 1 July 2009. It is at tab 26 of the bundle and is signed by RMV who I have taken to be Mr Valentine and another person with the initials LST. It provides amongst other matters that Mr McNeish phoned [Broadbase Central] at 9.51am and said that he was a longstanding client of Broadbase Otago and knew Mr Valentine from that firm. It provided that Mr McNeish was not happy with the changes at Camelot Investment Advisors and he wanted to meet with Mr Valentine. An appointment was made.

[128] The fourth request on 5 July 2009 is from S Rowley. Ms Rowley hand wrote a letter dated 12 September 2010 which is at tab 30 of the common bundle. In the letter Ms Rowley said that the first seed of doubt she had was the change of name because Camelot did not seem to be an appropriate name. The second seed and biggest she wrote was the *getting rid of Liz*. Ms Rowley wrote that she had always known about Broadbase Central and decided to meet with Mr Valentine to see if she could relate to him as well as she had with Bruce Wood and Don Broad. After meeting she decided to transfer. She wrote that at that time she did not know that Mr Broad was moving to

Broadbase Central. She ended her letter with the words *this is a true and factual statement of events*.

[129] The next request is G Richardson. The date of his request to transfer his account to Broadbase Central is recorded on the list at Tab 13 as 9 July 2009. Mr Richardson wrote a letter dated 9 September 2010 which is a tab 31 of the common bundle. Mr Richardson wrote of some unhappiness at the time Mr Wood sold his business and he was not consulted. He set out concerns that Mr Skerrett wished him to transfer to the Grosvenor system and he was concerned that the shares that he had personally selected for his portfolio would be sold to allow for the purchase of shares Grosvenor selected. He wrote that although Mr Broad provided the level of advice required and did discuss transferring to the Grosvenor system and accepted that Mr Richardson wished to continue selecting investments as and when required. He wrote that on receiving advice that Mr Broad had resigned from Camelot he felt he would again be pressured to use the Grosvenor system and lose control of his investment selections so chose to look elsewhere for another financial advisor. Mr Richardson wrote that he was aware of Broadbase Central and met with Mr Valentine. He wrote that Mr Broad had no part in his decision to shift his investments from Camelot to Broadbase Central and that he made the decision of his own free will.

[130] The next request to transfer to Broadbase Central is dated 15 July 2009 and is from Miss A Marshall. Miss Marshall also signed a letter which is at tab 29 and is undated. She wrote that she was very disappointed when Ms Heseltine was let go and her concerns increased when Mr Broad resigned from Camelot as there would be no one in the Dunedin office. She stated that contacting Mr Skerrett on his cell phone would be expensive for a superannuitant and was unacceptable to her. She wrote that she wanted someone local to discuss her investment with and she looked for another investment adviser and found Mr Valentine who was part of the Broadbase Group with whom she had dealt with. She then met with and liked Mr Valentine duly shifting her investments to Broadbase Central. She said in her letter that she was very pleased to be informed in late September 2009 that Mr Broad was working with Mr Valentine and that Mr Broad had no part in her decision to use another investment adviser.

[131] The next request to transfer an account to Broadbase Central was on 17 July 2009 from the Milne Family Trust. There is a typed letter on file signed by I.W. and A.M. Milne that states they were both former clients of Broadbase Otago Limited and that this company was sold to an Invercargill based company with the operating name of Camelot. They wrote that after attending several group meetings run by the company they decided they did not like the style or attitude of the new management and decide to transfer their financial affairs to a Dunedin based company Broadbase Central.

[132] The final request to transfer on 22 July 2009 was from Cedars Munro Limited and The Cedars Trust.

[133] There were reasons I find why the clients referred to in the first part of tab 13 may have become unhappy and looked elsewhere for a local financial advisor. I do not find it was a situation where the reasons for a number of clients deciding to transfer were simply inexplicable. There was the redundancy of Ms Heseltine in or about March 2009 from the Dunedin office of WSIL who was well known and respected by several of the clients who left as someone who could be readily contacted about their investments in Dunedin. There was some concern that the administration function would be Invercargill based. Some clients were unhappy at the initial sale by Broadbase Otago to WSIL and the changes in management. No doubt the fact that Mr Broad was still present in the office resolved some of the concerns but then the notification to clients of Mr Broad's resignation by letter sent on or about 3 July 2009 seems to have been the catalyst for several transfers due to a concern that there would not be anyone physically in the Dunedin office. This being against a background of concerns about potential running down of the Dunedin office. There was concern from one of the 11 clients that there had been pressure to change investment platforms.

[134] As to why Broadbase Central was chosen by the clients several of the clients explained in their letter that they either knew Mr Valentine previously or at least knew of Broadbase Central. Given the history with Broadbase Otago that is not unlikely. Several of the clients who left and signed a letter explaining why placed emphasis on getting a local advisor. There was no direct evidence from any of the 11 clients that they had been deliberately solicited or encouraged by Mr Broad to leave but some of

the clients in their respective letters specifically address this and say it was not in fact the case.

[135] I then consider the allegation that Mr Broad prepared and provided a standard letter used to transfer these 11 clients' portfolios. There is no evidence to satisfy me that was the case. The evidence supports that in all likelihood Mr Valentine prepared the letters that perhaps not surprisingly are a standard template. I do not find that allegation made out.

[136] I then consider whether the two email exchanges relied on by WSIL support that Mr Broad was involved with Broadbase and its director whilst still an employee and whether he showed himself to be knowledgeable about Broadbase's affairs. The emails relied on are at tab 19 of the common bundle. There is an exchange between Mr Valentine and Mr Broad dated 23 June 2009 in which Mr Valentine asks if a client is one of his. Mr Broad then responds on the same day and confirms the client is. Mr Broad in his evidence said that sometime as a result of Broadbase Otago and Broadbase Central using the Aegis investment platform sometimes Aegis sent things to the wrong Broadbase and Mr Broad said that this occurred at this time. The client referred to is not on the list at tab 13 and it does not appear to have been suggested that the client was solicited.

[137] The second email exchange is between Gordan Rail and Mr Broad and is at tab 23 of the bundle. It is dated 30 June 2009. Mr Rail asks Mr Broad if Ross is still operating as Broadbase. Mr Broad confirms he is and reliance is placed on the words he uses *He is but it is about to change in the near future*. Mr Broad explained in answer to a question from the Authority that this statement was made in the context of Broadbase as a group fragmenting and the business renaming as an advisor in Christchurch was facing significant charges. I do not find that either of those emails support that Mr Valentine and Mr Broad were somehow acting in concert.

[138] It is alleged further that Mr Broad breached his duty of fidelity by, on 30 March 2009 in an email to clients, the Jamieson's, criticising WSIL's decision to make Ms Heseltine's position redundant. Mr Broad said to the Jamieson's in the email that against his wishes the company have retrenched Liz's position to Invercargill with the 31st of March being her last day. He goes onto say *I have expressed my dissatisfaction but to no avail. Therefore to all intense [sic] purposes I will be man & lady Friday*. I can understand that Mr Skerrett in circumstances where

he believed Mr Broad solicited clients would be concerned about this email when he came upon it. Ms Heseltine though was known to Mr and Mrs Jamieson and although it would have been preferable for Mr Broad to have put the change to administration support in a positive way I am not satisfied that the email itself amounts to a breach of clause 4.2. Even if it did I accept Mr Churchman's submission there is no evidence that this caused the Jamiesons to leave or think less of WSIL. In fact by their response it is clear the Jamiesons mistakenly thought that Ms Heseltine had gone to the Invercargill office so were not left with the correct view that she had actually gone altogether.

[139] There is reliance on an email exchange at tab 15 of the bundle in which it is alleged that Mr Broad tried to isolate clients so they would only deal with him. Kayla Allen from WSIL attaches a list of Aegis clients that Warren Skerrett is wanting her to make contact with and asks if there are any on the list that he did not want her contacting. She states that she has attached, although it was not in the bundle, a copy of a survey that Mr Skerrett had produced for a guide line. Mr Broad duly provides a list of clients not to contact who he is in regular contact with. I am not satisfied on the face of the exchange it is a breach of the obligations in clause 4.2. It is an exchange between employees. It was not secret or covert and Mr Broad was simply doing as he was asked and providing a list of clients he did not want contacted. There is a further email exchange at tab 16 in which Mr Broad says his name not Mr Skerrett's should be put on a client communication. I am not satisfied that this amounts to an attempt to isolate clients. It was open to Mr Skerrett to take issue with it with Mr Broad but does not in itself support an attempt to isolate. It is again an open exchange between employees and not covert.

Conclusion

[140] I am not satisfied that I can draw an inference in the absence of direct evidence that Mr Broad informed clients of WSIL of his plans to leave WSIL and laid the foundation for the future transfer of their business to him beyond the one breach identified with Mr Hopkins. I do not find evidence to support a breach of clause 4.2 of the employment agreement with respect to solicitation of the eleven clients that transferred their accounts after Mr Broad gave notice of his resignation but before termination of his employment.

[141] In conclusion therefore I have not found allegations that Mr Broad breached clause 4.2 of his employment agreement made out save for one breach of clause 4.2 by Mr Broad in respect of unsuccessfully attempting to solicit Mr Hopkins and/or not conducting his duties in the best interest of WSIL by discussing Mr Hopkins investment platform and supporting that he resist any change to it. There was no damage suffered by WSIL as a result of that breach.

[142] For completeness between the date of termination and the sale of WSIL to Camelot a further six clients are recorded at tab 13 as transferring their accounts to Broadbase Central. One of those clients has been counted twice so that would reduce the number to five. Ms Rowley is one of the six clients with the transfer of another of her accounts after Mr Broad's employment was terminated. Had the Authority modified the restraint then there would have been an issue arising as to whether these clients, in the absence of evidence as to solicitation, fell within the six client carve out.

Confidentiality

[143] Mr Towner in his submissions seeks an inquiry into what loss WSIL has suffered as a result of alleged breaches of clause 11.7.2; the confidentiality provision.

[144] Mr Towner submits that the only basis that the respondent was aware of the client's requirements for professional services in relation to their financial affairs was as a result of the applicants confidential information. He submits that commonsense suggests that the respondent would not have undertaken work for any of the clients had he not been aware of the applicants confidential information and misused it.

[145] Some reliance is placed on an approach Mr Broad made to Sentinel. Sentinel is a commercial entity which developed a reverse mortgage facility for older clients who were asset rich and cash poor. Broadbase Otago became an agent for Sentinel and Mr Broad completed accreditation courses to be able to represent Sentinel. Sentinel carried out all marketing and referred client initiated enquiries to accredited advisors to assess clients for suitability and ensure they made informed decisions. When Mr Broad became accredited he was able to provide an additional income stream for Broadbase Otago and received 10% of commissions and brokerage received from Sentinel in addition to his base salary.

[146] Mr Churchman submits that there is no evidence in relation to any of the clients who transferred that Mr Broad has ever misused any confidential information.

[147] In terms of Sentinel he submits that there was one client involved only although Mr Chong refers to *clients* and that Mr Broad was simply following up on why he had not been paid a commission from the first applicant by this client.

Conclusion

[148] I accept Mr Churchman's submission that there was no evidence before the Authority for it to conclude a breach by Mr Broad of his confidentiality obligations that he had in his employment agreement with WSIL. Mr Skerrett for example under questioning by Mr Churchman agreed that his belief in [48] of his original statement of evidence that Mr Broad had used confidential information was speculation.

[149] In relation to the Sentinel matter there was concern that Mr Broad had instructed emails from Sentinel be sent to a different email address from WSIL. Mr Broad said that he could not recall advising Sentinel of his new email address. He received an email about the processed loan from Sentinel and sent an invoice to WSIL for 10% of the commission. That I imagine triggered concern from WSIL about how Mr Broad came to know of this particularly against a background of strong suspicions he was responsible for the client account transfers.

[150] That concern though was largely addressed by Sue Vivian from Sentinel in her email dated 7 October 2009 to Mr Skerrett and Mr Chong. She confirmed that there were no other loans to be processed, the concern was only about one client and she apologised for the sending of the email to Mr Broad. I accept Mr Churchman's submission that Mr Broad chasing up his commission could not be seen as using confidential information. Mr Skerrett under cross examination by Mr Churchman agreed there was nothing sinister in Mr Broad doing that. I do not find it has been established that Mr Broad used confidential information in relation to any dealings with Sentinel.

[151] I do not find the claim for a breach of confidentiality is made out.

Costs

[152] I reserve the issue of costs. It should be possible for the parties to resolve this issue even with there being a number of preliminary issues. If that does not prove possible then Mr Churchman has until 28 November 2013 to lodge and serve submissions as to costs and Mr Towner has until 19 December 2013 to lodge and serve submission as to costs.

Helen Doyle
Member of the Employment Relations Authority