IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 312

File#: 5593774

BETWEEN	8i CORPORATION and 8i LIMITED Applicants
AND	SEBASTIAN MARINO Respondent

File#: 5638676

BETWEEN	SEBASTIAN MARINO Applicant
AND	8i CORPORATION Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	R L Towner and S Maxfield Counsel for Applicants/Respondent A C Schirnack and C Hogg Counsel for Respondent/Applicant
Investigation Meeting:	On the papers
Date of Determination:	15 September 2016

DETERMINATION OF THE AUTHORITY

A. The claims of 8i Corporation and 8i Limited under file No 5593774 and the claims of Mr Sebastian Marino under file No 5638676 are removed to the Employment Court pursuant to s.178(1) of the Employment Relations Act 2000 (the Act).

Employment Relationship Problem

[1] The applicants/respondent, 8i Limited (8i) and 8i Corporation (the Corporation) and the respondent/applicant Mr Sebastian Marino are in the holographic virtual reality business.

[2] The overall thrust of the dispute between the parties and the proceedings currently before the Authority arise out of issues between the parties concerning the processes, software, hardware and code used in the creation of volumetric video.

[3] 8i and the Corporation claim, (among other things) that Mr Marino and Uncorporeal Systems Inc (Uncorporeal), the company he established following his departure from 8i, are using its confidential information to create volumetric video.

[4] 8i claims it is the only company in the world, other than Uncorporeal, "seeking to solve the exact same virtual reality technology issues that [it] has carved a niche in"[1]. Mr Marino disputes the claims.

[5] 8i, the Corporation and Mr Marino are party to a settlement agreement dated 25 May 2015, signed by a mediator under s.149(3) of the Employment Relations Act 2000 (the Act), on 19 June 2015 (mediated settlement).

[6] Other parties to the mediated settlement are Mr Linc Gasking (co-founder of 8i) and The Thingamajig Laboratory Limited (Jiglab), a film and video production company of which Mr Marino is a director and sole shareholder.

Dispute process in mediated settlement

[7] Clause 6 of the mediated settlement states that in the event of a dispute between the parties about whether Mr Marino has materially breached the mediated settlement, the dispute will be referred to the Employment Relations Authority for final determination.

[8] Mr Marino denies any material breach of the mediated settlement. 8i and the Corporation seek a final determination from the Authority regarding whether Mr Marino has committed a material breach.

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1 Second Aamended SOP para 2.5(g)

[9] In the event of a material breach by him, clause 6 of the mediated settlement requires Mr Marino to transfer his remaining common stock in 8i to the Corporation for the sum of $1. Mr Marino claims that this clause amounts to a penalty clause and cannot be relied on by 8i and the Corporation to withhold payments due to him.

Claims in the Authority by 8i and the Corporation against Mr Marino – File 5593774

[10] 8i and the Corporation claim multiple and material breaches by Mr Marino of the mediated settlement including his obligations as to confidential information, non-competition, restraint of trade and the return of property.

[11] Payments due to Mr Marino under the mediated settlement are being held in trust by the lawyers for 8i and the Corporation. Payments are not being made to Mr Marino, pending the Authority's final determination on the issue of material breach.

Claims in the Authority by Mr Marino against the Corporation – File 5638676

[12] Mr Marino disputes the claims and says the Corporation has failed to pay monies due to him and are therefore in breach of the mediated settlement. In any event, Mr Marino says the Corporation cannot rely on clause 6 of the mediated settlement as it amounts to a penalty clause and is unenforceable as a matter of public policy.

[13] Mr Marino has filed proceedings in the Authority seeking a compliance order requiring payment of monies he says are due to him under the mediated settlement.

[14] The parties have agreed that their respective proceedings filed in the Authority be consolidated.

Preliminary Issue

[15] In respect of Mr Marino's claim that clause 6 of the mediated settlement is a penalty clause and is unenforceable, the parties seek a preliminary determination from the Authority.

[16] The preliminary question for the Authority is, can clause 6 of the mediated settlement, certified under s.149 of the Act, be challenged on the grounds it is a

penalty clause? Put another way, does s.149(3) of the Act override the common law position that penalty clauses are contrary to public policy and unenforceable?

Relevant facts

[17] 8i began as a start-up film and technology company in Wellington in May 2014. Two of its co-founders were Mr Linc Gasking and Mr Sebastian Marino. Mr Gasking and Mr Marino are highly experienced in the field of film and technology innovation. 8i developed ground breaking virtual reality technology[2].

[18] The Corporation is a company incorporated in the USA and holds shares in 8i.

[19] As well as being a director and shareholder of 8i, Mr Marino was employed by 8i as Chief Creative Officer pursuant to a written individual employment agreement dated 1 June 2014. The employment agreement contained a number of provisions concerning 8i's confidential information and business interests, proprietary rights and in respect of non-competition and restraint of trade.

[20] Mr Marino resigned in November 2014. Mr Marino's resignation was part of an overall settlement with 8i, the Corporation, Mr Gasking and Jiglab which included the mediated settlement.

Buy - Back Variation Agreement

[21] On 28 November 2014, 8i and Mr Marino entered into a buy-back variation agreement (the buy-back agreement). The buy-back agreement was expressed to vary the terms of the Founder Subscription Agreement (Founder Agreement).

[22] The buy-back agreement was entered into on the same date as a Settlement agreement between the parties to the Founder Agreement.

[23] The buy-back agreement detailed the sale by Mr Marino of a significant number of his ordinary shares in 8i "…as part of the settlement between the parties".

[24] As part of the overall settlement, Mr Marino resigned as Chief Creative Officer of 8i and as a director but retained a shareholding in 8i. On 25 May 2015, the mediated settlement was entered into.

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2 Stuff.co.nz 5 May 2014

[25] On 28 May 2015, Mr Marino established Uncorporeal Systems Inc, and is its CEO. Uncorporeal creates volumetric video.

Mediated settlement- 25 May 2015

[26] The mediated settlement is complex and records obligations by the parties under the buy-back agreement, Founder agreement, in addition to those contained in Mr Marino's employment agreement.

[27] Clause 1 of the mediated settlement states:

> This Settlement Agreement is conditional on, and will take effect from, closing under the Share Exchange Deed for the 8i flip of jurisdiction between the Company [8i], the Corporation and each shareholder of the Company. The settlement agreement between the Company, Mr Marino, Mr Gasking and Jiglab dated 28 November 2014 will terminate immediately on the date this Settlement Agreement is unconditional and takes effect.

[28] Clause 6 of the mediated settlement states:

> Continued payment of instalments of the settlement amount under the buy-back variation agreement is dependent on Mr Marino not committing a material breach of the settlement agreement. If Mr Marino commits such a breach, then the corporation may, by notice in writing to Mr Marino within 20 days of such breach (**notice**), and subject to the terms of this clause 5, following the expiry of 20 days following the date of the notice, buy-back any remaining common stock not yet bought back under the buy-back variation agreement, and Mr Marino will sell such common stock to the corporation, for a total nominal consideration of $1 i.e. not on a per common stock basis but in aggregate (and Mr Marino irrevocably appoints the company and the corporation as his agent and attorney with full authority to act on Mr Marino's behalf to give effect to the buy-back provisions in clause 5 including executing any necessary share transfer documentation). However, if Mr Marino disputes, by providing notice in writing to the company within 20 days of the notice, that a material breach has been committed, then the dispute will be referred to the Employment Relations Authority for final determination and, in the meantime:
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> (a) The payment of any Settlement Amount moneys will be made by the company to the Bell Gully trust account to be held on trust for the parties; and
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> (b) Mr Marino will continue to hold the remaining shares, pending the outcome of the determination.

[29] Clause 6 of the mediated settlement is at issue in respect of the first preliminary issue for the Authority

Can clause 6 of the mediated settlement, certified under s.149 of the Act, be challenged on the grounds it is a penalty clause?

[30] Put another way, does s149(3) of the Act override the common law position that penalty clauses are contrary to public policy and unenforceable?

[31] From the evidence before the Authority, the mediated settlement appears to have been entered into for the purposes of recording what is primarily a commercial arrangement between the parties which includes a method in clause 6, to resolve any issues arising out of the arrangement, by referring it to the Authority.

[32] Mr Marino is challenging the legality of clause 6 of the mediated settlement. Mr Marino claims that even if the Authority determines he has materially breached the mediated settlement, 8i and the Corporation " are not entitled to buy-back any remaining common stock for the nominal consideration of $1, because the clause requiring the respondent to sell his remaining common stock at undervalue…is a penalty clause and unenforceable as a matter of public policy".

[33] This issue concerns the scope, in my view, of s.149(3) of the Act. The ability for parties to conclude settlement agreements which are final and binding and (except for enforcement purposes) the terms of which cannot be brought before the Authority or Court, are specifically provided for in the Act[3].

[34] This is an important question of law. Because of the importance of the question of law together with the complexity of the dispute which largely concerns a commercial relationship, I am of the opinion that in all the circumstances the Court should determine the matters.

Determination

[35] Pursuant to s.178(1) of the Act, the Authority orders the removal of these matters to the Employment Court.

Anna Fitzgibbon
Member of the Employment Relations Authority

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[3] Sections 143-148,149,151,152