

Note: An order prohibiting publication of some evidence applies to this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 112
3132395 & 3133016

BETWEEN	BRYCE IMMS Applicant in 3132395 and Respondent in 3133016
AND	ARCHITECTURAL GLASS PRODUCTS LIMITED Second Applicant in 3132395
AND	VIRIDIAN GLASS LIMITED PARTNERSHIP Respondent in 3132395 and Applicant in 3133016

Member of Authority: Robin Arthur

Representatives: Sarah Rawcliffe, counsel for Bryce Imms and
Architectural Glass Products Limited
June Hardacre and Danielle Findlay, counsel for
Viridian Glass Limited Partnership

Investigation Meeting: 19 March 2021

Determination: 22 March 2021

DETERMINATION OF THE AUTHORITY

- A. With effect from 7 April 2021 the term of employment between Bryce Imms and Viridian Glass Limited Partnership (Viridian) headed ‘Non-Solicitation of Clients’ is modified by the deletion of the words “or carry out any work of the same nature for”.**

- B. In light of findings made in this determination an application by Viridian for an interim injunction need not be determined.**

Employment Relationship Problem

[1] On 7 April 2021 Bryce Imms intends starting employment with Architectural Glass Products Limited (AGP) as an account manager. AGP operates a double-glazing manufacturing business. To take up this new employment Mr Imms resigned from his role as an account manager for Viridian Glass Limited Partnership (Viridian), a provider of residential and commercial glass and glazing. He resigned with one month's notice on 7 December 2020. He took leave from 16 December 2020. His employment with Viridian formally ended on 7 January 2021.

[2] Viridian and AGP are competitors in the glass industry.

[3] Mr Imms' employment agreement with Viridian included some restraint of trade terms. One was a non-competition clause limiting work for a competing business for three months after his employment ended. The three month gap between his end date at Viridian and his intended start date with AGP complies with that limit.

[4] However another clause, headed Non-Solicitation of Clients, applies for six months from the end of his employment with Viridian. Mr Imms and AGP applied to the Authority for findings on whether the detailed provisions in that clause were reasonable and enforceable in a way that would affect what work he was permitted to do for AGP between 7 April and 7 July 2021, that is during the second three months of the six month period.

[5] Viridian responded to that application with its own application to the Authority. It sought an interim injunction until the Authority could determine whether Mr Imms, in whatever work he did for AGP, was prohibited until 7 July 2021 from soliciting orders from or doing any work for any customers he had contact with when he worked for Viridian.

[6] The two applications were dealt with together on an urgent basis and directed to mediation but the issues between the parties were not resolved there. They returned to the Authority for investigation and determination.

[7] Mr Imms had meanwhile provided a signed undertaking confirming that he would not solicit those Viridian clients or do any work at AGP for those clients for three months, that is until 7 April 2021.

[8] Shortly before the Authority investigation meeting was held the issue for resolution was further refined to just one point in the non-solicitation clause. Through a memorandum of counsel lodged in the Authority Mr Imms advised that he would abide by the part of that clause that prohibited soliciting of clients. He asked only for determination of the question of whether the ‘non-dealing’ part of the clause (which referred to carrying out “any work of the same nature” for those clients he had dealt with while employed at Viridian) was reasonable and enforceable. The parties agreed that Viridian’s application for an interim injunction would need only be considered if there was a finding that part of the term was enforceable. If the finding were otherwise, there would be no basis for considering an interim injunction.

The Authority’s investigation

[9] To accommodate the urgency accorded to these two applications and to minimise costs, no formal statements of reply were required from the respondent to each application. Rather Viridian’s application for an interim injunction, and the reasons stated in it, was taken as, in effect, its statement of reply to Mr Imms’ application. Viridian’s North Island Sales Manager Glenn Sandall and North Island General Manager Paul Meiring lodged affidavits giving their evidence in support of the company’s application. Mr Imms and AGP managing director David Bunting had already each lodged an affidavit setting out their account of relevant facts. Mr Imms also lodged, under timetable directions made, an affidavit in reply to what Mr Sandall and Mr Meiring had said. Mr Imms’ reply affidavit was taken as, in effect, being his statement in reply to Viridian’s application.

[10] At the investigation meeting Mr Sandall, Mr Meiring and Mr Imms each gave some further oral evidence, under oath. The representatives also gave written and oral closing submissions on the facts and relevant legal principles.

[11] While all the affidavits, documents, oral evidence and submissions given in this matter have been considered in preparing this determination, it was not necessary to record all evidence and submissions received. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made.

Financial information and names of clients prohibited from publication

[12] Financial information and the names of clients referred to in the pleadings and evidence provided by the parties is prohibited from publication in relation to these proceedings. This order is made under clause 10 of Schedule 2 of the Act.

The relevant terms of Mr Imms agreement with Viridian

[13] Mr Imms has worked in the glass industry for 19 years. He had qualified and worked as a glazier before starting work as an account manager for Viridian in July 2014. The employment agreement he entered at the time of starting that job did not include any restraint of trade terms. It did include this term on confidential information:

Confidential information

You may gain information during the course of your employment, which is confidential and/or commercially sensitive.

It is important that you recognise this information and understand that you are not permitted to either directly or indirectly release information, which may disadvantage the Company's present or future operations.

Upon termination of your employment you must return any documents, letters, papers, business cards and other material of every description (including customer lists and/or price structures, computerised records and copies of or extracts from the same) that you possess or control relating to the affairs and business of or belonging to Viridian Glass.

The above restrictions apply both during employment and after termination.

[14] In May 2018 Mr Imms was offered and signed a variation to his original terms of employment. The variation provided an increase in his salary from \$75,000 to \$95,000. It also included these new restraint of terms (bold emphasis added) that then formed part of his employment agreement:

2. NON-COMPETITION

You agree that for a period of 3 months following the termination of your employment for whatever reason, you shall not, either personally, or as an employee, consultant or agent for any other entity or employer, carry on business in competition with Viridian Glass within a radius of 100 kilometres from Viridian Glass' premises in Auckland.

3. NON-SOLICITATION OF CLIENTS

You agree that for a period of 6 months following the termination of your employment for whatever reason, you 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

Viridian Glass with which you had any contact or dealings whilst employed by Viridian Glass.

4. NON-SOLICITATION OF EMPLOYEES

You agree that for a period of 6 months following the termination of your employment for whatever reason, you shall not, either personally, or as an employee, consultant or agent for any other entity or employer, solicit or engage or employ any employee of Viridian Glass with whom you had any dealings whilst employed with Viridian Glass.

SEVERABILITY

In the event any portion of clauses 2, 3 and 4 are viewed as unenforceable by any other Authority or Court with jurisdiction to consider such clauses, the clause shall apply as modified by the Authority or the Court, or in the event it is not modified by the Authority or Court, the remainder of the clause and agreement shall continue to be enforceable by the parties. In the event of redundancy, the company would not seek to enforce these restraints.

Why the non-dealing provision was at issue

[15] As noted earlier, by the time of the investigation meeting, Mr Imms had confirmed through an undertaking and a memorandum of counsel that he would abide by the non-competition clause (which expires on 7 April 2012), the non-solicitation of employees clause and, for the full six month period to 7 July 2021, the part of clause 3 which prohibited soliciting of any client or customer of Viridian with which he had any contact or dealing while employed by Viridian. Only the non-dealing part of clause 3, highlighted in bold type in paragraph [13] above, remained in issue.

[16] According to Mr Bunting's evidence, some AGP customers were previously or still were also clients of Viridian. Some customers switch between suppliers in the competitive market or split orders between suppliers based on lead time, quality, price and service.

[17] Mr Bunting said AGP had employed Mr Imms as an account manager for day to day management of customers' accounts. He said "getting customers on board" at AGP (that is soliciting clients) was usually carried out as a higher level than account managers. The restraint on Mr Imms carrying out "any work" for those AGP customers "of the same nature" as he had done for them as customers of Viridian meant AGP could not effectively and fully use Mr Imms in its daily business for a further three months. The wide scope of the term, referring to "any client or customer" Mr Imms had ever dealt with in his six years of working for Viridian, however fleetingly, meant any contact with some AGP customers would be out of bounds.

[18] Mr Imms and AGP therefore asked for a finding that this non-dealing provision was unreasonable and therefore unenforceable or, alternatively, was enforceable only for the three months to 7 April and not the full six month period to 7 July 2021.

[19] Viridian said the non-dealing provision, as part of the non-solicitation clause, was reasonable and enforceable as legitimate protection of its proprietary interest in valuable customer connections Mr Imms had formed and developed on its behalf while working for Viridian.

Relevant legal principles

[20] As a starting point the law regards restraints of trade as unlawful.¹ In a market economy such restraints are seen as unwelcome fetters on competition and the freedom of individuals to move jobs and to use their skills and experience. They are justified and enforceable only to the extent they are in the public interest and are reasonable and necessary to protect specific and legitimate proprietary interests of an employer.² The provision must be no wider than necessary to protect those public and proprietary interests.³

[21] Proprietary interests are identified advantages or assets held or developed by or for the employer that it would be unjust to allow an employee to appropriate for her or his own purposes, even though the employee may have helped create such an advantage or asset.

[22] One recognised category of such interests are business or trade connections, often referred to as client relationships, developed or sustained by an employee during their employment. An employee may reasonably be restrained from soliciting clients or customers she or he had particular knowledge of or contact with during the employment. This includes situations where customers have relied on the skill and judgement of the employee or dealt exclusively with the employee so that this personal acquaintance may sway those customers into moving their business from the employer to the employee's new activity.⁴

¹ *Broadcasting Corp of New Zealand v Nielsen* (1988) 2 NZELC 96,040 at 96,047 (HC).

² *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 at 495.

³ *Stenhouse (Australia) Ltd v Phillips* [1974] AC391, 402 (PC).

⁴ *Airgas Compressor Specialists Ltd v Bryant* [1988] 2 ERNZ 42 at 53.

[23] The length of time reasonably allowed for a restraint protecting a proprietary interest in customer connections is no longer than the period adequate to give the former employer an *opportunity* to prepare to meet the competition. It is not so long as to provide for the certainty of winning that competition or simply for however long the employer expects to enjoy a competitive edge over others also seeking to do business with their clients.⁵ One factor in assessing reasonableness is how long it may reasonably take to have a replacement employee appointed, trained and familiarised with the methods, accounts and customers.⁶

[24] The reasonableness of a restraint clause is to be determined at the time the agreement was entered into.⁷ The Authority's power to modify such a term, and to give effect to the term as modified, is expressly related to what provision would have been reasonable when the original term was agreed.⁸

Scope of the proprietary interest in the customer connections

[25] Applying those principles to the particular factual setting in this case leads to two findings.

[26] Firstly, Viridian had a legitimate proprietary interest in the customer connections Mr Imms fostered on its behalf through his dealings with some customers during his employment. The evidence from him, Mr Sandall and Mr Meiring established that Mr Imms was a persuasive representative in retaining and expanding custom. In part this was because of his knowledge of the industry and use of his skills as a qualified glazier to help customers solve problems or service issues that arose during the supply of material to fabricators who used Viridian glass in the products they then supplied to residential and commercial construction businesses. He was assisted in building rapport and goodwill with those customers through Viridian's investment in organising social activities for personnel of key customers. This investment included providing free tickets to major rugby fixtures, organising chartered fishing trips and providing regular on-site barbecue nights using a trailer purchased for the purpose. In these ways Mr Imms had used his skill and experience to foster those customer connections but had done so on Viridian's payroll and with the help of its marketing

⁵ *Stenhouse*, above n 3, at 402.

⁶ *Debtor Management (NZ) Ltd v Quail* [1993] 2 ERNZ 498, 508 and *Tullet Prebon (Australia) Pty Ltd v Simon Purcell* [2008] NSWSC 437 at [68] and [80].

⁷ *Gallagher Group*, above n 2, at [23].

⁸ Employment Relations Act 2000, s 162 and Contract and Commercial Law Act 2017, s 83.

budget. While Mr Imms was entitled to take that skill and experience, further developed through his work with Viridian, with him to new employment, Viridian was also entitled to retain the value of those customer connections and the goodwill developed at its expense.

[27] Secondly, however, the non-solicitation clause (including its non-dealing provision) was cast more widely than reasonably necessary to protect Viridian's legitimate proprietary interest in those customer connections. The reference to "any" client or customer Mr Imms had "any" contact or dealing with in his employment clearly went too wide. It encompassed more than the category of customers which, at the time that the restraint was entered, the parties could reasonably have contemplated he would develop significant sway or influence through frequent contact or dealings which resulted in high levels of trust and reliance in him.

[28] The evidence before the Authority on the extent of Mr Imms' influence with customers was limited. From Mr Sandall's evidence it was clear that Mr Imms was a well-regarded and trusted account manager who was largely left to his own devices while Mr Sandall spent time assisting other account managers who needed more help. Mr Imms had a smaller portfolio than other account managers and was formally responsible for around 27 accounts. In mid-December Mr Imms attended a 'hand over meeting' with Mr Sandall and Matt Tunnicliffe, a Viridian account manager who took over the accounts previously managed by Mr Imms. Their discussion focussed on 16 accounts identified as priority accounts. Mr Sandall was satisfied Mr Imms provided him and Mr Tunnicliffe with thorough answers to all questions asked about contact information and intelligence about those customers, including discussions with them about pricing. Mr Imms also followed up with some additional information by email.

[29] However three of those customers, referred to in the evidence as "the key accounts", were the crux of Viridian's concerns. The description of those clients in this determination is deliberately vague due to the parties' concerns about commercial and client confidentiality but the parties know who those entities are.

[30] In the period from 2017 to 2020 Mr Imms spent around two thirds of his working time dealing with the accounts of those three customers. While Mr Imms contacted other customers on a regular weekly or fortnightly basis, he was in daily contact with the personnel of those three businesses. Those personnel were also the

focus of much of the spending on entertainment events Mr Imms organised at Viridian's expense. The three 'key accounts' generated some millions of dollars to Viridian revenue each year. There was no real contest in the evidence or submissions that Mr Imms, through his work, had developed influential relationships with those clients and their key personnel that a suitably drafted term of restraint could reasonably protect.

Reasonable duration of the non-dealing restraint

[31] From that evidence and those findings, two points arose for resolution. Both concerned the prospect of modification of clause 3. Mr Imms and AGP sought modification by way of deletion of the non-dealing provision, with effect from 7 April 2021 onwards. Viridian, as its submissions developed in light of the evidence and discussion of it at the investigation meeting, sought either no such modification or, if one were to be made, a continued prohibition in relation to the three key accounts in which it had a legitimate proprietary interest of protecting its customer connections from unfair competition.

[32] Both modifications could be considered under the provisions of the Contract and Commercial Law Act 2017 (CCLA) which allow the Authority to delete or modify a restraint of trade term found to be unreasonable. Such changes were possible here, if a finding the term was unreasonable was made, because the parties had already attended mediation without resolving the matter between themselves and I was satisfied any other remedy would not be appropriate or adequate.⁹

[33] Clause 3 was plainly unreasonable at the time it was entered into. Its reference to "any" customer and, in the non-dealing provision, "any" work went well beyond protecting only the legitimate proprietary interests of Viridian, including its goodwill in customer connections. It meant every fleeting contact Mr Imms had with customers would be captured, rather than only those in which his dealings with them had established the necessary persuasive level of connection.

[34] In the light of that finding, the clause required either deletion or modification. As Mr Imms had, meanwhile, voluntarily accepted the provisions relating to non-solicitation of clients continued to apply until 7 July 2021, deletion of the whole clause was not an appropriate outcome.

⁹ Employment Relations Act 2000, s 164.

[35] Operation of s 83 of the CCLA, and of the severability clause in the variation to Mr Imms' employment agreement in May 2018, meant two options for modification could appropriately be considered.

[36] The first was deletion of the non-dealing provisions as Mr Imms asked. Its effect would be that he would be able to deal with any Viridian customers who were also AGP customers from 7 April 2021. In effect such as deletion would set the shorter period of three months from 7 January 2021 as the modified period to which the non-dealing provision could reasonably have applied.

[37] The second option was to consider whether the modification of the non-dealing provision could be made in a way that continued to apply to just the three 'key accounts'. Arguably, this would recognise Viridian had a reasonably-established legitimate proprietary interest in those connections developed or enhanced through Mr Imms' work while employed by Viridian. Its interest could be protected by prohibiting him for the further three month period, until 7 July 2021, from assisting AGP with carrying out any business with those three entities.

[38] For the following reasons the second modification option, retaining the prohibition on any dealing with Viridian's three key customers, was not appropriate.

[39] Firstly, such a provision about key customers could reasonably have been contemplated by the parties at the time that the restraint term was entered into. Viridian failed to do so and cast its net unreasonably widely.

[40] Secondly, and more importantly, such a non-dealing restriction in relation to those three accounts was longer than reasonably necessary for Viridian to prepare to meet the prospect of competition from AGP. This was clear from the evidence that Mr Meiring and Mr Sandall gave, in their affidavits and their supplementary oral evidence at the investigation meeting. While not an assessment of matters at they were at the time that the restraint was entered into, their evidence showed three months was an adequate period for Viridian to get its ducks in a row and get a head start in preparing to meet potential competition. No longer period was necessary for that purpose.

[41] Viridian had not sat on its hands once it got Mr Imms resignation. There was initially some to-ing and fro-ing over whether he would reveal his new employer was AGP. However by mid-December Viridian personnel had worked out where he was

going. Viridian promptly appointed an existing account manager, Mr Tunncliffe, to take over the accounts for which Mr Imms was previously responsible. There was no delay until someone new was recruited and trained in the company's systems. Viridian was able to move promptly to ensure Mr Tunncliffe was well briefed, particularly about the key accounts. He and Mr Sandall gathered intelligence about those accounts from a helpful handover meeting with Mr Imms. They also visited customers with gifts before the Christmas break to introduce Mr Tunncliffe. In subsequent weeks Mr Sandall, Mr Meiring and Mr Tunncliffe embarked on a programme of meetings with those customers. Before doing so they reviewed pricing and other servicing strategies. They arranged for new pricing models to be approved and then tested within Viridian's ordering system. Mr Sandall and Mr Meiring then arranged and attended meetings with clients to present proposals for their consideration. None of those clients had, they said, declined to meet with them or indicated they would prefer to be dealing with Mr Imms. Decisions about the proposals Viridian had presented were now in the hands of those clients to make. While it was too early to say if the pitches made would be successful in retaining all Viridian's business with those customers, both Mr Sandall and Mr Meiring agreed, when asked at the Authority's investigation meeting, that Viridian's measures to shore up those customer connections were well underway.

[42] In light of that information it was also clear that Mr Imms knowledge of Viridian's product pricing and marketing strategy had already, to some degree, become out of date in the three months since his employment there ended. What remained in his knowledge was subject to the confidentiality obligations which endured from his former employment agreement with Viridian.

[43] There were some competing public interest policies to weigh. Mr Imms was not honouring the full extent of the agreement he had entered in May 2018.¹⁰ However, in the particular circumstances in this case, this did not outweigh other important policy considerations regarding free competition and free use of skill and experience.

[44] Accordingly, balancing the actual factual setting and the public policy factors, a modification to clause 3 that would preserve the non-dealing provision until 7 July 2021 was not appropriate. Rather, adequate protection was given to Viridian's proprietary interest by deleting the non-dealing provision with effect from 7 April 2021.

¹⁰ *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58 at [21].

This provided Viridian with the benefit of three months' protection from when Mr Imms' employment with it had ended and, from 7 April, the freedom for Mr Imms and AGP to have him involved in the full range of work in his new role. This is subject to the non-solicitation provisions in the remainder of clause 3 with which Mr Imms has voluntarily agreed to abide until 7 July 2021.

Modification of clause 3 by deletion of non-dealing provision

[45] In exercise of the discretion given to the Authority through s 83(1)(b) of CCLA clause 3 of the agreement between Mr Imms and Viridian is modified, with effect from 7 April 2021, by deletion of the words "or carry out any work of the same nature for". The remainder of the clause, as modified, remains in effect until the expiry of the period of six months set it in.

Other matters

[46] Another matter touched on in the evidence of Mr Imms and Mr Meiring and the submissions of the parties concerned whether consideration was given for the terms of restraint. While this determination has not needed to resolve that question in reaching its conclusion, it was nevertheless tolerably clear that the salary increase offered in May 2018 was in consideration of the restraint terms sought by Viridian in return. While Mr Imms' view was the amount offered was simply an adjustment to bring his salary to a "market level" at that time, it nevertheless met the requirements in law for consideration.¹¹ Neither was any procedural failure established in how the offer was presented and accepted. Mr Imms had the opportunity to take advice and, if he wished to, then seek adjustments at that time to those restraint terms before accepting the offer. He elected not to do so. While he said Mr Meiring did not expressly point out that the non-solicitation clause included a non-dealing provision, Mr Imms was able to read the letter and chose to accept its terms.

No interim injunction

[47] In light of the findings made in this determination, Viridian's application for an interim injunction need not be determined.

¹¹ *Fuel Espresso*, above n 10, at [17] and [18].

Costs

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[49] If they are not able to do so and an Authority determination on costs is needed Mr Imms may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Viridian would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[50] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Robin Arthur
Member of the Employment Relations Authority

¹² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [106]-[108].