IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 218
3134596

	BETWEEN	DU VAL MANAGEMENT LIMITED Applicant
	AND	JAMIE HENDERSON First Respondent
		WILLIAM CORPORATION LIMITED Second Respondent

Member of Authority:	Vicki Campbell
Representatives:	Madeleine Lister & William Buckley, counsel for Applicant John Farrow & James Cowan, counsel for First Respondent Gwen Drewitt, counsel for Second Respondent
Investigation Meeting:	On the papers
Submissions Received:	23 April 2021 and 12 May 2021 from Applicant 7 May 2021 from First and Second Respondents
Determination:	21 May 2021

DETERMINATION OF THE AUTHORITY

A. The application for interim orders is declined.

B. Costs are reserved.

C. The parties are directed to mediation.

Employment relationship problem

[1] Du Val Management Limited (DVML) claims a former employee, Jamie Henderson, is breaching a restraint of trade provision in his employment agreement by

working for William Corporation Limited (WCL), which DVML says is a competitor. DVML claims WCL has aided and abetted Mr Henderson's breaches. DVML has lodged a claim in the Authority seeking various orders and remedies for the alleged breaches and seeks an interim injunction preventing Mr Henderson from working for WCL pending the determination of its substantive claims.

[2] In support of its application DVML has lodged an affidavit and an undertaking as to damages.

[3] Mr Henderson opposes the interim injunction sought on the basis that the restraint of trade is unreasonable and unenforceable.

[4] This determination deals with the application for an interim injunction which the parties agreed to the Authority determining on the papers. These papers included the contents of the statements of problem and reply, affidavits and submissions made by the parties.

[5] The Authority has received affidavits from Ms Merissa Gibson (sales manager for DVML), Mr Henderson and Mr Stephen Pike (sales manager for WCL).

[6] As permitted by s 174E of 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 as a result. While I have not referred in this determination to all the evidence received I have carefully considered all relevant material lodged with the Authority.

Interim application

[7] An application for interim injunction involves the exercise of discretion. The basis on which applications for interim orders are to be decided can be summarised as follows:[1]

(a) DVML must establish there is a serious question to be tried that Mr Henderson has breached the terms of his employment agreement and has an arguable case for the substantive relief sought;

[1] See, *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36 at [7] referring to the Court of Appeal in *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

(b) Consideration must then be given to the balance of convenience, and the impact on the parties of granting, or the refusal to grant, an order;

(c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[8] The merits of this case, in so far as they can be ascertained at the interim stage, are relevant in the assessment of the balance of convenience and the overall justice of the case. The assessment relies on the as-yet-untested evidence in the affidavits and what can be discerned from the pleadings and documents provided by the parties.

[9] Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

Background

[10] DVML is a real estate development company based in Auckland. It specialises in residential-led regeneration projects, delivering and managing new residential homes and apartments for both owner-occupiers and investors. Based on the affidavit evidence I have concluded that DVML's focus is large apartment developments located in the South Auckland area.

[11] WCL is a property development company based in Auckland, Wellington and Christchurch. It mainly develops terraced housing in the Auckland areas of West Auckland and Mount Albert.

[12] Mr Henderson is 27 years old. He decided to move from a career in Aviation to property. He started his real estate salesperson certification during 2020 and started working for DVML on 3 November 2020 as a Property Advisor, an entry level sales role and a role he held for only three months.

[13] In his role Mr Henderson to undertook the following duties:

(a) Present, promote and sell DVML products/services using professional sales techniques to existing and prospective customers;

(b) Keep up to date with current DVML products and services;

(c) Perform needs analysis of existing/potential clients to meet their needs;

(d) Establish, develop and maintain positive business and customer relationships;

(e) Liaise with external parties;

(f) Supply reports on customer needs, problems, interests and competitor activities;

(g) Prepare and present Sales and Purchase Agreements.

[14] Mr Henderson's employment agreement contains restraining covenants in the following terms:

> **Non-Competition**
> 34.1 For a period of 12 months after the Employee's employment ends the Employee must not directly or indirectly engage in, be connected with (as an Employee or in any other capacity) or have an interest in any business that competes directly with the Employer within New Zealand.
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> **Non-Solicitation of Clients**
> 34.2 For a period of 12 months after the Employee's employment ends, the Employee must not either personally, or as an employee, consultant or agent for any other entity or employer:
>
> a. Canvass or solicit any of the Employer's former or current clients;
>
> b. Accept business or work from any of the Employer's former or current clients;
>
> c. Directly or indirectly discuss, advise, on or transact business for any of the Employer's former or current clients; and
>
> d. Procure or assist anyone else to do any of these things or be directly or indirectly financially involved with any person, firm, company or other body doing any of these things.
>
> **Non-Solicitation of Employees**
> 34.3 For a period of 12 months after the Employee's employment ends, the Employee will not, either personally, or as an employee, consultant or agent for any other entity or employer:
>
> a. Induce or attempt to induce any of the Employer's Employees, agents, officers or consultants to end their employment, appointment or engagement or to become employed, appointed or engaged in a competing business.
>
> b. Procure or assist anyone else to do any of these things.

[15] Under the terms of Mr Henderson's employment agreement he was paid a guaranteed retainer of $41,184 per annum, paid fortnightly, which was to be offset against future commissions. Mr Henderson was to receive payment of a $10,000 commission for each unconditional sale and purchase agreement achieved. Payment of the commission was to be made after DVML had received the deposit on an unconditional sale and purchase agreement.

[16] Mr Henderson resigned from his position on 19 January 2021 and requested his final day be 26 January 2021. The employment agreement required four weeks' notice. In his letter of resignation Mr Henderson advised DVML that he had not accepted any alternative offers of employment and he would be taking some time to determine his next career move.

[17] On receipt of his resignation letter and when Ms Gibson enquired as to why Mr Henderson was resigning, he told Ms Gibson he had issues with the timing of commission payments. He was not receiving sufficient income or stability in the short term to support his lifestyle and financial obligations. When Ms Gibson offered to resolve this issue Mr Henderson told her that would not make him reconsider his resignation because he wanted more freedom.

[18] Mr Henderson's resignation was accepted and he was placed on garden leave from 19 to 26 January 2021.

[19] Ms Gibson became aware Mr Henderson had secured employment and was working for WCL in early February 2021. Ms Gibson was concerned Mr Henderson was in breach of the terms of his employment agreement and on 9 February DVML wrote to Mr Henderson raising its concerns and reminding Mr Henderson of the post-employment restraint provisions contained in his employment agreement.

[20] On that same day DVML wrote to WCL pointing out the terms of Mr Henderson's employment agreement and requesting undertakings from WCL that it would not request or require Mr Henderson to commit further breaches of his post-employment restraints.

[21] Mr Henderson advised DVML that he was not employed by WCL but was an independent contractor operating his own property consultancy and that he had no intention of soliciting DVML's clients or employees.

[22] WCL confirmed to DVML that Mr Henderson had been engaged by it as an independent contractor in the role of Property Sales Consultant based in Auckland. WCL agreed it would not aid or abet Mr Henderson to solicit any clients or employees of DVML for the 12 month restraint period.

[23] On 15 February 2021 Ms Gibson was advised that Mr Henderson had contacted Mr Pike on three separate occasions during his employment at DVML. The calls were made on 14, 15 and 19 January 2021. Ms Gibson deposed that this is evidence that Mr Henderson had been in discussion with WCL prior to his resignation. Ms Gibson was concerned these contacts were inconsistent with Mr Henderson's notification in his letter of resignation that he had not accepted any alternative offers of employment and would be taking some time to determine his next career move.

Serious question to be tried

[24] Whether there is a serious question to be tried, that there has been a breach of the restraint of trade provision in the employment agreement, involves assessing:[2]

(a) Whether the restraint of trade is a valid restraint, the prima facie position being that restraints of trade are contrary to public law and not enforceable; and

(b) If the restraint is valid, whether, by working for WCL, Mr Henderson is in fact in breach of that restraint of trade.

[25] The threshold for a serious question is that the claim is not frivolous or vexatious. A decision on this aspect is not an exercise of discretion rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.

Is the restraint of trade enforceable?

[26] In order to override the prima facie position rendering a restraint of trade unenforceable DVML needs to show that it has a legitimate proprietary interest and that the restraint is no wider than is reasonably necessary to protect that interest.[3]

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[2] *Western Bay of Plenty District Council* and *Brooks Homes* above n.1.
[3] *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at [23].

[27] The proprietary interests DVML seeks to protect are its confidential information and intellectual property including client contact information, customer preferences and interests as well as its sales and marketing strategies and template contracts.

[28] The Courts have recognised that confidential information is a proprietary interest and have expressly stated that a restrictive covenant may be necessary, in addition to any confidentiality obligations, to protect the inadvertent disclosure of confidential information in the course of further employment.[4]

[29] The protection sought by enforcing the restraint of trade covenants relates to protecting DVML's former and current customer base from unfair competition, where competition might arise because Mr Henderson has knowledge about DVML's customers that would not otherwise be readily available to a competitor. DVML seeks to protect the relationship Mr Henderson developed with its former and current clients and prevent Mr Henderson from gaining an unfair advantage, by exploiting the intimate knowledge of preferences and financial goals he would have gained over time with the clients he had had contact with while working for DVML.

[30] The affidavit evidence discloses that Mr Henderson had limited access to DVML's database of individuals and their contact details. He was assigned particular leads only and could not access the full database. DVML acknowledges the database could not be downloaded, but says the information can be easily recorded externally by taking screen shots or photographs or by retaining the information in the minds of those who access it. There are no allegations that Mr Henderson has taken screenshots or photographs of the customer information contained in the database.

[31] DVML says Mr Henderson had access to information relating to over 50,000 individuals and their contact details. Again there is no evidence currently before the Authority to suggest Mr Henderson took time to work through the database memorising any of the 50,000 plus entries.

[32] From the affidavit evidence I have concluded that Mr Henderson's role required him to contact leads provided by DVML initially by phone. If there was no response further attempts would be made over a seven day period. After seven days a lead would

[4] *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252; *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97.

fall into one of three categories: Qualified; disqualified; or no engagement. After being categorised the next steps were:

(a) If the lead was disqualified or there was no engagement, the lead would be categorised as "nurturing". Nurturing leads would be reallocated to another property advisor at a later date.

(b) If the lead was qualified:

i. The lead would be asked to meet to discuss their requirements and see if the product was aligned to their situation. If the qualified lead liked the product and was in a positon to buy, a conditional contract was signed;

ii. Ten days of due diligence followed during which time the property advisor supported the deal and assisted the client with any information required;

iii. If the prospective buyer was satisfied, they moved to an unconditional contract and paid a ten per cent deposit, which completed the sale.

[33] In his affidavit Mr Henderson states that not all of the leads he contacted turned into clients. DVML has not defined in the employment agreement, when a lead becomes a client.

[34] DVML submits that current clients include those leads with whom Mr Henderson had material dealings or personal contact on behalf of DVML. This includes those leads who had undergone significant "nurturing" but were yet to complete a transaction.

[35] Where a lead is placed on the nurture list it is arguable they are not in fact a client at that stage but simply a potential client. Mr Henderson argues that such leads are not covered by the restraining covenants which refer to "...former or current clients". Not every potential business contact constitutes a dealing with a client. In CBS Engineering Ltd v Strand the Court held:[5]

[5] *CBS Engineering Ltd v Strand*, unreported, Auckland Employment Court, 31 March 1995, AEC22/95.

> ....the practical way of identifying whether any person has been a customer of the plaintiff is to ascertain whether the commercial relationship has resulted in the generation of an invoice or a tax invoice by the plaintiff in respect of commercial transactions during the relevant period.

[36] Clarity about what constitutes a client in this case will be a matter for the substantive determination.

[37] DVML says Mr Henderson had significant exposure to its sales and marketing strategies and that these were discussed during twice daily sales meetings. Mr Henderson disputes this and deposed that during his time with DVML what he learned of its sales and marketing strategies was simply that the business targeted first home buyers and investors in the South Auckland market. Products were marketed on social media but he never saw a formal plan or document that outlined the strategy for how marketing was planned or executed. Mr Henderson deposed that the marketing on social media appeared generic with no notable difference between DVML's approach and other property developers in the market.

[38] DVML claims Mr Henderson had access to its sales and purchase agreement which it had developed for its clients. Mr Henderson deposed that he has never used the DVML agreement and does not need to. WCL has developed and uses its own sales and purchase agreement which is the one used by Mr Henderson.

[39] The next question is whether the restraints are wider than necessary. In *Air New Zealand v Kerr* the Court confirmed that the answer to this question requires consideration of the duration of the restraint, its scope and geographical limits.[6]

[40] Each of the restraining provisions are said to apply for a period of 12 months after the employment ends. Ms Gibson deposed that this is necessary because it can take up to 12 months for a lead to crystallise into a confirmed client.

[41] The non-compete provision extends to cover the geographical region of the whole of New Zealand. In my assessment this is problematic for DVML. The affidavit evidence indicates that DVML operates to sell new housing in the South Auckland region and not elsewhere in New Zealand currently.

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[6] *Air New Zealand* above n 3.

[42] Whether the 12 month period is reasonably necessary to protect DVML's proprietary interest will be a matter for the substantive determination. This will require an assessment of how long is reasonably required to either recruit or train a replacement or have an existing employee take over Mr Henderson's contact list and then to establish contact.

[43] Mr Henderson has signed a contract for services with WCL. That contract does not provide for a non-compete clause but does prohibit the solicitation of clients, contractors or suppliers for a period of six months.

[44] DVML submitted that the restraining covenants may be modified by the Authority from 12 months to six months exercising its discretion under s 83 of the Contract and Commercial Law Act 2017.

[45] The Court has previously held that 12 months is at the upper end of a restraint period, taking into account the seniority of the position held by the employee.[7] In a judgment of the Court dealing with restraining covenants of an employee in a sales supervisor role (as opposed to here where Mr Henderson was in an entry level role), the Court held that a three month restraint of trade was at the outer limit of a reasonable restraint.[8]

[46] Based on the untested evidence I have concluded it is possible that both the time period and the geographic area may be subject to modification. However, such an order is a matter for the substantive determination following attendance at mediation by the parties where modification is a topic for discussion.[9]

Is Mr Henderson in breach of the restraining covenants?

[47] Mr Henderson is engaged in or has a business interest in a business that may compete with DVML and that he has been so engaged within the 12 month non-compete period. Mr Henderson submits that he is not in "...direct competition..." with DVML because he is selling properties in a different geographic area. WCL develops properties for sale in West Auckland and Mount Albert. The affidavit evidence suggests DVML develops and sells properties in South Auckland.

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[7] *Hally Labels v Powell* [2011] NZEmpC 63 at [99], *Grey Advertising (New Zealand) Ltd v Marinkovich* [199] 2 ERNZ 844.
[8] *Cain v Turners and Growers Fresh Ltd* [1998] ERNZ 314 at p 331 line 14.
[9] Employment Relations Act 2000, s 164.

[48] Mr Pike deposed that WCL is not in direct competition with DVML because of their relative size, their building products, and geographical region:

(a) WCL is the seventh largest residential property builder in New Zealand (based on consents issued) and its developments are smaller in size ranging from 10 – 15 homes per site. In contrast DVML develops fewer properties on a larger scale of mainly apartments managed by a Body Corporate.

(b) WCL has 78 developments ongoing within New Zealand whereas, DVML has 8 projects on the go;

(c) WCL has built a total of 617 residential properties (including apartments and up to three bedroomed homes) whereas DVML has built 1134 apartments.

[49] I am cognisant that clients may reside throughout New Zealand and not only in Auckland. This applies particularly for investors who do not intend to reside in the property.

[50] Mr Henderson's affidavit discloses evidence that he contacted a lead from DVML after he started working for WCL. When he made the contact he understood the lead had not committed to DVML and was neither a former nor current client of DVML. This contact did not result in the person entering into a sales and purchase agreement with WCL.

[51] DVML submits that this contact is an example of the proprietary interest it is seeking to protect. Mr Henderson was only aware of the financial goals and interests of the prospective client because he had contact the lead while working as an employee for DVML.

[52] Mr Henderson deposed that since working for WCL that he has not contacted any DVML clients and has no motivation to do so as WCL's lead generation provides him with sufficient leads to contact.

[53] I do not understand there to be any dispute that while working for DVML Mr Henderson used his own personal mobile number when contacting existing and prospective customers and he retained that number when he left.

[54] Ms Gibson is concerned that any existing or prospective clients had a direct line of communication with Mr Henderson after he started providing services to WCL. Mr Henderson has acknowledged some leads did make contact with him after he left DVML but asserts that these leads were referred back to DVML.

[55] Mr Henderson acknowledged that he did have some contact information saved into his phone, but before swearing his affidavit on 29 March 2021 he deleted all contacts on his mobile device that were not his personal contacts.

Conclusion

[56] I have concluded there is a serious question to be tried as to the enforceability of the restraining covenants in the employment agreement and whether Mr Henderson has breached any enforceable provisions. The issues are arguable and exceed the frivolous or vexatious threshold.[10]

Balance of convenience

[57] The balance of convenience weighs the potential effect on Mr Henderson if the interim orders were granted against the potential effect on WCL if the interim orders are not granted. This also involves a consideration of the merits of the application and an assessment of the impact on the parties of granting or not granting the interim order, having regard to whether damages would be an adequate remedy if the interim position is reversed after the substantive investigation.

[58] If the order is granted there will be significant hardship to Mr Henderson as he will not be able to provide services to WCL for a period of 12 months, or earlier if the substantive claim is able to be heard and determined before 26 January 2022, which is unlikely.

[59] I accept that if Mr Henderson is unable to provide services to WCL until January 2022 his capacity to earn income will be significantly reduced. Mr Henderson is a young man embarking on a new career and his work for DVML was at an entry level where he earned slightly more than the minimum wage.

[60] DVML submits that there are five companies in New Zealand it considers to be in direct competition to it and that it is open for Mr Henderson to find alternative work

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[10] *Western Bay of Plenty District Council* and *Brooks Homes* above n 2.

within the property industry beyond the five companies. If this is the case, then that should have been specified in the employment agreement. The clause states that Mr Henderson is prohibited from being engaged in or involved in "...any business that competes directly...".

[61] Mr Henderson is 27 years old and the job with DVML was his first in the industry. He worked for three months. His retainer was equivalent to 90 cents per hour more than the minimum wage. The payment of commissions were subject to DVML receiving a deposit for an unconditional sale. Ms Gibson says this could take anywhere between six months to a year.

[62] Under the terms of his employment agreement Mr Henderson was required to complete a 90-day trial period and have his employment confirmed as permanent before he became entitled to any commission payments. This means that for the duration of his employment, which was three months, Mr Henderson did not qualify for the payment of commissions.

[63] DVML submitted that during his three month tenure Mr Henderson earned $67,000. No breakdown of the earnings or evidence of when and how payments may have been made has been provided. Payment of commissions during the first three months of employment would be inconsistent with the terms of the employment agreement.

[64] There is no evidence that DVML has lost any customers as a result of Mr Henderson providing services to WCL. In his affidavit Mr Henderson has made it clear that other than the one lead he contacted he has not and does not intend to contact any of DVML clients or take any other steps in breach of non-solicitation provisions.

[65] I have considered whether damages would be an adequate remedy. DVML submits that Mr Henderson through his affidavit evidence has established he would be unable to meet any damages award. As such a damages award against Mr Henderson could not adequately address the losses suffered by DVML as a result of any found breaches.

[66] Mr Henderson's evidence referred to by DVML to support its submission related to the financial hardship he would suffer if he was unable to continue working for WCL. I am satisfied that if he continues to earn an income he will be in a much

stronger position to meet any damages award than if he is restrained from working for WCL.

[67] If I decline to make the orders sought, and Mr Henderson is not restrained from providing services to WCL then damages will be an adequate remedy. Having weighed the various factors discussed, I find the balance of convenience does not favour granting the interim orders DVML sought.

The overall justice

[68] The overall justice is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience.[11]

[69] DVML has an arguable case, however there are elements of the restraining covenants that are potentially unreasonable making them unenforceable or subject to significant modification.

[70] DVML submits the overall justice lies in its favour for the following reasons:

(a) Mr Henderson misled and deceived DVML as to the reason for his resignation, when he advised it that he had not accepted any alternative offers of employment. At that time Mr Henderson had signed a contract with WCL. So while technically correct that he had not accepted employment, he had certainly agreed to be engaged by WCL;

(b) Mr Henderson sought a reduced notice period, depriving DVML of a realistic opportunity to shore up its client relations, prior to his termination; and

(c) Actively sought to solicit a lead he had been nurturing while employed by DVML.

[71] Mr Henderson submits the overall justice lies with him because:

(a) DVML is attempting to enforce an unlawful restraint of trade provision which purports to prohibit competition; and

[11] *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

(b) DVML will not suffer any detriment if he continues working until the substantive matter can be determined.

[72] There are no allegations that previous or current clients have left DVML. Apart from Mr Henderson's acknowledgement that he contacted one lead from his contact list, there are no allegations by DVML that Mr Henderson has breached the non-solicitation provisions of the employment agreement.

[73] Unlike other cases where restraining covenants have been investigated, there are no allegations that Mr Henderson has taken or is using confidential information belonging to DVML. I am satisfied Mr Henderson has provided reasonable undertakings to abide by the confidentiality provisions of his employment agreement to not solicit DVML clients or employees.

[74] It is apparent that Mr Henderson may have misled DVML at the time he proffered his resignation. That could be considered a breach of good faith for which remedies are available. In relation to DVML's submission of the consequence on it as a result of Mr Henderson seeking a reduced notice period, it was always open to DVML to enforce the contractual notice period. It chose not to do that.

[75] The overall justice of this case favours declining DVML's application for interim orders.

Costs

[76] Costs are reserved and will be dealt with when the substantive matters have been determined.

Further mediation

[77] Section 159(1)(c) of the Act requires the Authority to consider from time to time whether to direct the parties to use mediation. Given my findings I consider it appropriate to direct the parties to attend further mediation and in good faith attempt to resolve the employment relationship problem between them.

Vicki Campbell
Member of the Employment Relations Authority