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NZLR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 539/96

UNDER the Commerce Act 1986

AND the Fair Trading Act 1986

BETWEEN CLEAR COMMUNICATIONS LIMITED

Plaintiff

AND TELECOM CORPORATION OF NEW ZEALAND LIMITED

First Defendant

AND THERESA ELIZABETH GATTUNG

Second Defendant

Hearing: 5 March 1997

Counsel: C.A. Sweeney QC & J. Elworthy for Plaintiff
J.E. Hodder & P.R. Jagose for Defendants

Judgment: 5 March 1997

ORAL JUDGMENT OF ANDERSON J

SOLICITORS

Elworthy's (Auckland) for Plaintiff
Chapman Tripp Sheffield Young (Wellington) for Defendant

By a Notice of Application dated 18 November 1996 the plaintiff applied ex parte to this Court for Anton Piller orders and subsidiary orders for the purposes appearing from my judgment in respect of that application delivered on 22 November 1996. The application for Anton Piller orders failed but orders were made ex parte in the following terms:-

1. An interim preservation order subsistent to further order preserving the physical or electronic records in the power or possession of the 1st or 2nd defendants relating to sales or marketing usage patterns and logs of customers of the plaintiff whose services are provided by way of telecommunications network operated by the 1st defendant.

2. An interim injunction subsistent to further order restraining the 1st and 2nd defendant from deleting, expunging, destroying or altering the physical electronic records in the power or possession of the 1st or 2nd defendants relating to sales or marketing usage patterns and logs of customers of the plaintiff whose services are provided by way of telecommunications network operated by the 1st defendant.

Subsequently the defendants applied to rescind those orders and in a Notice of Application for directions the plaintiff sought, amongst other orders, an interim order restraining the first defendant from providing sales and marketing staff with information relating to Clear's toll customers.

An amended Statement of Claim filed by the plaintiff proceeds on causes of action under the Commerce Act and Fair Trading Act, but the basis of the interim interlocutory applications is alleged breach of the terms of an interconnection agreement imposing obligations of confidentiality on the plaintiff and on the first defendant in connection with the provision of network

services by Telecom to Clear. The general background is traversed in my judgment of 22 November 1996.

The specific provisions of the interconnection agreement entered into between the plaintiff and first defendant in 1996 are clauses 30.5.1, 30.5.2, 30.6, 30.7 and 30.9, which are in the following terms:-

> 30.5.1 CLEAR agrees to use all reasonable care to ensure that to the extent that CLEAR obtains any Telecom Confidential Customer Information such information shall not be used by CLEAR for sales or marketing purposes.
>
> 30.5.2 Telecom agrees to use all reasonable care to ensure that to the extent that Telecom obtains any CLEAR Confidential Customer Information such information shall not be used by Telecom for sales or marketing purposes.
>
> 30.6 For the avoidance of doubt the parties acknowledge and accept that nothing in **Clause 30.5** is intended to prevent a party from utilising any information about the other party's customers which is generated solely within the first party's own network from its own records. Examples (which are not intended to be exhaustive) of the effect of this **Clause 30.6** are as follows:
>
> 30.7 The parties acknowledge that in certain circumstances members of their respective staffs engage in multiple roles or functions and a party shall not be deemed to have failed to take all reasonable care not to use Confidential Customer Information for sales and marketing purposes merely because Confidential Customer Information is provided to a person who has multiple roles or functions (one of which is sales or marketing) for purposes other than sales or marketing.
>
> 30.8 The parties acknowledge that breach by either of them of any of the provisions of **Clause 30.5** may cause the other party damage for which monetary damages would not, by virtue of **Clauses 21 and 22**, be available. However, the absence of any such damages shall not be a bar to a party seeking injunctive relief against the breach or threatened breach of **Clause 30.5** by the other, in addition to any other remedies that may be available.

Various items of correspondence record concern on the part of Clear that Telecom was breaching the confidentiality provisions and the plaintiff's anxiety was exacerbated by a report in the Infotech section of the Dominion published on Monday 21 October 1996, as mentioned in my judgment of 22 November. If in fact Telecom had a customer service computer system which gave its Services staff the ability to trawl the customer database for calling patterns, identify customers who are using Clear a lot, and target them for the "Winback" campaign, there would seem to be a palpable breach of the confidentiality provisions above referred to. My earlier judgment accepted there was a sufficient basis for concern for the purposes of an ex parte application that the reported system was in place and operational to justify preservation and injunction orders which would have the effect of preserving records which might disclose whether in fact Telecom was operating as the report suggested.

In support of its Application for Rescission of the November 1996 orders and in opposition to the 5 December 1996 Application for Interim Injunction, Telecom has filed a number of affidavits from senior personnel including Ms Gattung, Ms C.L. Langley, and Auckland Manager, Commercial Issues, and Mr K.J.R. Calnon, a Service Representative at the Residential Sales and Service Centre in Lower Hutt. In addition, an affidavit has been sworn and filed for the first defendant by Mr N.A. Prince, Telecom's Manager Information Systems, who is responsible for the overall management and

development of Telecom Services' computer systems. Mr Prince deposes that Telecom has three principal computer systems, being its Marketing Decision Support System ("MDSS") which is of little or no relevance at this stage of the proceeding, its Integrated Customer Management System ("ICMS") which is a database of all Telecom's customer related activities, and its ES9000 system which manages records of Telecom's telecommunications activities including data essential to the process of billing carriers such as the plaintiff for the provision of delivery services.

This evidence of computer systems together with evidence from the other deponents for the defendants shows that Customer Sales and Service personnel, including the so-called 123 staff who deal with residential customer services, could obtain access to information called "linecard" information which would indicate whether a particular customer of Telecom had nominated Clear as its CPC, i.e. Customer's Preferred Carrier, whom that customer would access for toll purposes on a non code access basis.

I am satisfied on the information provided thus far that there is no facility available to customer or marketing personnel to "trawl" the customer database for calling patterns, identifying customers who are using Clear a lot, and targeting them for the "Winback" campaign. I am also satisfied that the Dominion report is wrong when it imputes to Telecom an ability to call up a screen showing usage patterns over the preceding months permitting the

targeting of customers "using Clear a lot". On the other hand, Service staff could access information said to be at a six screen depth of accessibility which would indicate that a particular customer whose record is before a particular Service operator has nominated Clear as its Customer's Preferred Carrier. On the other hand, there is no persuasive evidence before me to indicate that there is a pattern of use or even any particular incidence of use of the accessible "linecard" information by Service personnel.

The interconnection agreement permits, as indicated in clause 30.6 thereof, above, utilisation of information about another party's customers which is generated solely within the first party's own network from its own records. Telecom's own records are capable of showing, and in fact do show, virtually routinely to Service staff reasonably recent toll use patterns by its own customers sufficient to prompt communication between the Service staff and a particular customer concerning toll use in a way which does not have to transgress the confidentiality provisions to be of real value. The result of this facility is to render it unnecessary for Service staff to delve deeper into the electronic levels to discover what could be learned by inference and discussion far more quickly, conveniently and in a more friendly manner by direct dealing with the customer. It is also clear that this type of utilisation of own information is confined to customer by customer communications and not by a process metaphorically described as "trawling".

Naturally given the value of the market which the plaintiff and first defendant are contesting, and the lengthy history of apparent suspicion between them, Clear is ever watchful for indications of unfair competition and is anxious to the point perhaps of over-anxiety that something undesirable must be going on if there is an opportunity to do so. Subjective anxiety is not the criterion which affects my approach in this case. I am not satisfied that there is a sufficient question to be tried to justify the granting or maintaining of an injunction . I am, however, satisfied that some arrangement should be made for preserving records, not out of concern that relevant material would be deliberately expunged by the first defendant but because the massive amount of data generated in the ordinary course of Telecom's operations has understandably established systems for clearing information after a certain length of time. Simply to emphasise the necessity for preserving relevant information in the particular case for a relevant period, I intend to maintain a preservation order although amended in the way hereinafter appearing, the same to relate solely to the first defendant. There is no justification at this stage for maintaining any order against the second defendant, and, as I remarked to learned counsel in the course of submissions, it may be very doubtful whether on the basis of the amended Statement of Claim the second defendant is appropriately maintained as a party in the proceeding at all.

The defendants apply pursuant to Rule 107(4) of the High Court Rules for an order directing that all documents filed in this proceeding be transferred to the

proper office of the Court, it being the defendants' submission that the proper office is Wellington. The proceedings were commenced by filing in the Auckland registry of this Court originally, with the plaintiff relying on an affidavit by Mr Rudkin, a solicitor for the plaintiff, deposing that the material part of the cause of action sued on is the collection of information by Telecom as part of the provision by it of services to Clear and that the collection of such information is carried out in Auckland.

It appears at this stage that access by Telecom's Service staff to computer data, allegedly in breach of the confidentiality provisions, occurs elsewhere than Auckland. The Services 123 staff work at Hamilton, Lower Hutt and Christchurch. Any breach by such staff would represent a breach at the point that access occurs. Any other causes of action in the amended Statement of Claim based on the Commerce Art or Fair Trading Act must relate to alleged causes of action located elsewhere than Auckland. I think, with respect to the plaintiff's advisers, that Auckland is more relevant in terms of convenience than as the location of the occurrence of a cause of action and I find no reason, discretionary or otherwise, why the normal rule should not apply, namely that this proceeding should be conducted in Wellington, being the office nearest the residence of the defendant, and I shall make an order for transfer of the documents in the proceeding to Wellington for the further conduct of the litigation in that Court.

Telecom by counsel has indicated its willingness to give an undertaking to the Court in certain terms directed to the preservation of records. I do not think that such undertaking is in the circumstances quite broad enough, but I take account of the likelihood that an appropriate undertaking would be fairly considered by the first defendant in qualifying the preservation order I intend to make by reference to its extinction upon a relevant undertaking being given.

For the above reasons I make the following orders:-

1. An order rescinding the order for interim injunction made against the first and second defendant on 22 November 1996.
2. An order rescinding the preservation order made on 22 November 1996.
3. An interim preservation order to subsist until any further order of the Court, or until the filing of an undertaking by the first defendant to the same effect as the order hereby made, preserving the physical or electronic records created since 1 January 1996 in the power or possession of the first defendant relating to sales or marketing usage patterns and logs of customers of the plaintiff whose services are provided by way of telecommunications network operated by the first defendant..
4. An order in respect of costs as hereinafter set out.
5. An order transferring all documents filed in the proceeding to the office of the Wellington registry of this Court.

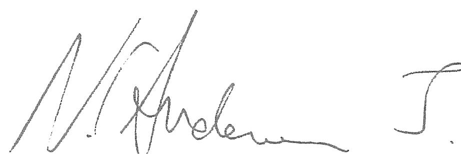
Costs

In the matter of costs, it is the argument for the plaintiff that ultimately the plaintiff has succeeded in obtaining a preservation order, although more limited as to its object and in relation to its scope than originally. The plaintiff submits that the appropriate course is to make an order for costs which fixes the amount but reserves the incidence of it to abide the outcome of the litigation as a whole. On the other hand, it is submitted on behalf of the defendant that the burden of the litigation has been carried by the defendants who have provided a good deal of factual information by way of affidavit to counter the case for the plaintiff which was, it is submitted, in effect based on anxiety arising from a newspaper article rather than reasonable grounds based on hard evidence.

I am bound to say that given the history between the parties, the report in the Dominion, which is a highly regarded newspaper, was bound to create concern in the mind of Clear and that such concern was not reasonably likely to be allayed, if at all, without an unambiguous and authoritative response on the part of Telecom indicating exactly how the report was wrong. The day following the publication the General Manager of Telecom wrote to the General Manager of Clear adverting to the article and stating that it was not correct that a Telecom system enables Services staff to identify Clear customers by reviewing call records and to target marketing activities specifically to those customers. Counsel for the plaintiff says this assertion is

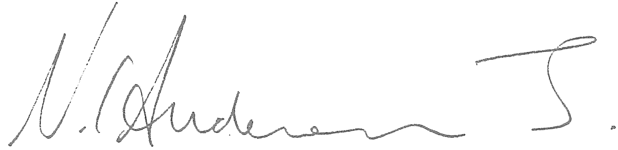
not in fact correct, as the affidavits subsequently presented on behalf of the first defendant demonstrate. The purport of such affidavits is that Services staff can in fact physically review information indicating that a customer has nominated Clear as that Customer's Preferred Carrier. However, any laconic element of the letter of 22 October 1996 is not responsible for the decision by Clear to seek an Anton Piller order. That decision seems to have been based not on Telecom's response but on the Dominion's report. On the other hand, advice by Telecom to the same effect as that now disclosed in the affidavits is also unlikely to have dissuaded Clear from bringing interlocutory proceedings as is shown by its resistance to rescission.

In all the circumstances I think it is appropriate to fix costs and award them at this stage. They cannot appropriately reflect anything like full solicitor/client costs, but it is plain that considerable effort has been expended by the defendants in the preparation of affidavits and in the conduct of the interlocutory proceedings including the hearing. I therefore make an award of costs against the plaintiff in favour of the defendants jointly (not severally) in the sum of $5000 together with disbursements as fixed by the Registrar.



NC Anderson J

Mr Sweeney asks me to note that the plaintiff's case is not posited at on any alleged breach of the interconnection agreement and that to the extent that breach of confidence is alleged the plaintiff intends to rely on equitable principles disjunctive of the contractual arrangements between the parties.



NC Anderson J