

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-004311

BETWEEN

MINHAS A & J LIMITED
Plaintiff

AND

GOODMAN FIELDER NEW ZEALAND
LIMITED
Defendant

Hearing: 8 May 2009

Counsel: IF Williams for plaintiff
WD Duggan for defendant

Judgment: 8 May 2009 at 5:20pm

(ORAL) JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for order setting aside claim to confidentiality]

Solicitors: Blackwells, PO Box 9325, Auckland for plaintiff
Bell Gully, PO Box 4199, Auckland for defendant

[1] The plaintiff applies pursuant to r 831 for orders:

- a) Directing the setting aside of the defendant's claim to confidentiality of the records described by the defendant's list affirmed by DM Clarkson on 15 December 2008; or
- b) Directions as to the procedure for future use and application of those records by the plaintiff, its advisers and potential witness in this proceeding.

[2] The application is opposed. The notice of opposition sets out the specific grounds which can be summarised as:

- a) The documents in question are confidential;
- b) The confidential documents concern a covert surveillance operation undertaken by private investigators at the defendant's bread distribution centre in East Tamaki, which was instigated in order to investigate and detect ongoing thefts of bread from those premises;
- c) Disclosure of the confidential documents would reveal secret and confidential details of the covert surveillance operation which would compromise the steps taken to counter thefts from the premises and would also compromise efforts to investigate and detect such thefts by way of similar cover surveillance operations in future;
- d) By reason of previous breaches of confidentiality by the plaintiff there are grounds for concern regarding disclosure of the confidential documents to the plaintiff and about the extent to which an undertaking from him provides adequate protection for the confidentiality of the documents;
- e) The defendant's greatest concern is regarding the possible disclosure to non-parties. In particular the defendant has a fundamental objection to disclosure of the confidential documents to any other

contractors who have access to the defendant's premises, as they are the very parties in respect of whom the confidentiality concerns most acutely arise.

[3] The background to this proceeding has been recorded in paragraphs 1 to 5 of the amended statement of claim (document 19 on the Court file) which I now set out.

1. At material dates the plaintiff was:
 - a. A duly incorporated company having its registered office at Auckland;
 - b. An independent contractor operating bread and milk runs in Auckland for the defendant.
2. The defendant is a duly incorporate company having its registered office at Avanti Finance Building, Block A, 65 Main Highway, Greenlane, Auckland and operating a bakery from East Tamaki.
3. On 10 April 2006 the plaintiff concluded a written contract with the defendant relating to delivery of the defendant's bread product within a stipulated geographical area in Auckland city ("the bread delivery contract"). The terms of the bread delivery contract are known to the defendant and are relied upon as if pleading in full.
4. Subsequently, on about 19 October 2006, the plaintiff concluded an oral agreement to deliver milk product of the defendant within the same approximate area ("the milk delivery contract"). The terms of the milk delivery contract are also known to the defendant also and are relied upon as if pleaded in full.
5. Pursuant to clause 29.2 of the bread delivery contract the parties agreed that the defendant could immediately terminate that agreement by written notice to the plaintiff in the event, inter alia:
 - (g) the contractor behaves in a manner which the company believes to be offensive or to be disruptive or detrimental to the company's business or reputationand
 - (i) the company has reasonable cause to believe that the contractor has been involved in a theft from, or perpetrated a fraud upon, a customer.

[4] At a conference held on 14 October 2008, with the assistance of counsel, I set out the specific issues involved in this proceeding as follows:

- (a) whether the plaintiff had behaved in a manner which the defendant believed to be disruptive or detrimental to the defendant's business or reputation (clause 29.2(g));
- (b) whether the defendant had reasonable cause to believe that the plaintiff had been involved in a theft from or perpetrated a fraud upon a customer (clause 29.2(i));
- (c) whether the defendant was entitled to terminate the agreements on one (or both) of those grounds;
- (d) if the termination constituted a breach of the distribution agreements, the loss (if any) that the plaintiff has suffered as a result;
- (e) if the plaintiff has suffered loss, whether any part of any such loss is properly claimable from the defendant.

[5] Mr Williams submits that the defendant's position relies essential on two positions: either that it had reasonable grounds for believing the plaintiff was a thief or, alternatively, that the plaintiff had acted in a manner that was detrimental to its business. Both positions depend significantly on records and which, he says, can generally be categorised as a surveillance and investigation of the plaintiff and others by the defendant and its servants or agents. The material includes statements by the defendant in written form.

[6] The defendant's concern is about thefts of bread from its premises, which is an ongoing problem. Disclosure of confidential documents and the kind of information which is sought here would compromise the steps that the defendant has taken to counter such thefts and might also compromise efforts to detect such thefts by way of similar surveillance operations in the future.

[7] The defendant's confidentiality concerns arise actually in relation to non-parties: particularly those who might be the genuine object of any surveillance.

[8] The defendant's counsel has advised that there is no objection to the documents being referred to the plaintiff by the plaintiff's counsel provided an appropriate undertaking is given. There will appear at the conclusion of this judgment a form of undertaking which has been taken from a more extensive draft that was put into operation by the parties. That will cover the immediate position of the disclosure of the documents to the plaintiff's counsel and to the plaintiff. The

same position applies in relation to any expert engaged by the plaintiff. Again, provided an appropriate undertaking is given by such person, the defendant does not see particular harm arising.

[9] So far as non-parties are concerned, as previously indicated, disclosure to them, even for the purpose of preparing briefs of evidence, might undermine the purpose for the defendant's surveillance and be of considerable prejudice to the defendant's position. In respect of that aspect of the application, the application will be adjourned so that the plaintiff's counsel, if the parties cannot agree, can identify particular documents which he considers there is a need to refer to a witness or for the Court to determine whether the disclosure is appropriate and, if it is appropriate, on what terms apply to such disclosure.

[10] Having regard to the orders that I now make, it is not necessary for me to make any final determination of the issue of the confidentiality of the documents.

[11] The orders that are now made are made on the basis that the new undertaking to be executed by Mr Williams discharges the undertaking which he has previously given. Accordingly I order:

- a) copies of the documents for which confidentiality is claimed in the affirmation of DM Clarkson shall be made available to Mr Ian Williams, counsel for the plaintiff;
- b) Mr Williams may disclose such documents to the plaintiff;
- c) It is a condition of the orders made that, before production is given:
 - i) Mr Williams will complete an undertaking in the form attached to this judgment, which shall be served on the defendant's solicitors;
 - ii) the plaintiff will complete an undertaking in the form attached to this judgment, which shall be served on the defendant's solicitors;

- iii) Neither Mr Williams nor the plaintiff or any other person on the plaintiff's behalf will copy the documents which are supplied to Mr Williams;
- d) leave is reserved to the defendant to apply for orders relating to the disclosure of this information if the documents are produced at trial;
- e) leave is reserved to the plaintiff to apply by memorandum on three working days' notice for an order extending the right to show the documents to parties other than himself and the plaintiff. In the event that such request is made, the Registrar shall arrange an urgent conference with counsel for the plaintiff and counsel for the defendant with myself or such other Judge who is available for the purpose;
- f) costs are reserved.

JA Faire
Associate Judge

UNDERTAKING AS TO CONFIDENTIALITY

I, **Ian Williams** of Auckland, barrister, hereby personally undertake to the High Court of New Zealand and to the defendant in CIV 2008-404-4311 (“the Proceeding”) that I will not:

show or in any way disclose to any person the contents of any document or any part of any document for which confidentiality has been claimed in Part 1 of the defendant’s affidavit of documents sworn in the Proceeding (“the Documents”), UNLESS the person to whom I show or in any disclose (“the Recipient”) any of the Documents:

- a. is a partner or employee of the firm of solicitors on the record acting for the plaintiff in the Proceeding; or
- b. is an expert accounting witness engaged by or on behalf of the plaintiff in the Proceeding for the purpose of providing expert evidence in the Proceeding.

Ian Williams

Signature

Date: May 2009

UNDERTAKING AS TO CONFIDENTIALITY

I, **Rawinder Singh Minhas** of Auckland, contractor, hereby personally undertake to the High Court of New Zealand and to the defendant in CIV 2008-404-4311 (“the Proceeding”) that I will not:

show or in any way disclose to any person the contents of any document or any part of any document for which confidentiality has been claimed in Part 1 of the defendant’s affidavit of documents sworn in the Proceeding (“the Documents”), UNLESS the person to whom I show or in any disclose (“the Recipient”) any of the Documents:

- c. is a partner or employee of the firm of solicitors on the record acting for the plaintiff in the Proceeding; or
- d. is an expert accounting witness engaged by or on behalf of the plaintiff in the Proceeding for the purpose of providing expert evidence in the Proceeding.

Rawinda Singh Minhas

Signature

Date: May 2009