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

**CIV 2015-443-075
[2015] NZHC 2881**

BETWEEN

SOPERS MACINDOE & BANKS LP
First Plaintiff

WILSON AND MACINDOE LIMITED
Second Plaintiff

SOPERS MACINDOE LIMITED
Third Plaintiff

AND

REX ERNEST SOPER
First Defendant

NICHOLAS REX SOPER
Second Defendant

JULIA MAREE SOPER
Third Defendant

WATENE MAEHE GALVIN
Fourth Defendant

KERRY IAN FORSYTH
Fifth Defendant

HARDWARE CONNECTIONS LIMITED
Sixth Defendant

NZ HARDWARE LIMITED
Seventh Defendant

Hearing: 19 November 2015

Counsel: D M Hughes and J V R James for Plaintiffs
No appearance by or on behalf of Defendants

Judgment: 19 November 2015

(ORAL) JUDGMENT OF HEATH J

Solicitors:
Anthony Harper, Auckland
Counsel:
J Billington QC, Auckland

Introduction

[1] Around 5pm last night, urgent “without notice” applications for search orders and an interim injunction were filed in this Court, at New Plymouth. I indicated to the Registrar that I would review the papers overnight. A hearing in Court for Chambers was convened at 8am this morning so that I could hear from counsel on any issues I wished to raise.

[2] I thank counsel for the quality of the information put before me at short notice, and for the helpful oral submissions made by Mr Hughes, for the plaintiffs, this morning.

Background

[3] Wilson and MacIndoe Ltd and Hardware Connections Ltd were limited partners in Sopers MacIndoe & Banks LP. Sopers MacIndoe Ltd was the general partner. Both carried on business as suppliers of building and architectural hardware to builders and construction contractors.

[4] The limited partnership was formed as a result of discussions between directors of the two limited partners following losses that each had suffered as a result of the collapse of a common customer, Mainzeal, in early February 2013. The limited partnership was formed in March 2013.

[5] Those responsible for the management of Wilson MacIndoe Ltd were Mr Tony Banks, Mrs Janet Banks and Mr Scott MacIndoe, whom I will call the “Banks interest”. Hardware Connections Ltd is run by Mr Rex Soper, Mr Nick Soper and Mr Watene Galvin, whom I shall call “the Soper interests”. Mr Kerry Forsyth was Chief Executive Officer of Hardware Connections Ltd before the effective merger of the two businesses.

[6] The new business under the name of the limited partnership commenced operation on 1 April 2013, following completion of settlement arrangements detailed in a Heads of Agreement dated 25 February 2013. Problems arose by early June 2014, the relationship between the Banks’ and Soper interests had become strained.

The Soper interests, led by Mr Rex Soper, effectively disengaged from the business. Eventually a “separation agreement” was signed on 5 September 2014. In effect, the Banks interests bought out the Soper interests to acquire the business run by the limited partnership.

[7] Messrs Rex Soper and Mr Nick Soper resigned as directors of the limited partnership following execution of the separation agreement. Their resignation took effect as at 5 September 2014. Mr Galvin had previously resigned as a director on 18 June 2014. He continued to be employed by the limited partnership. Mr Galvin and Mr Forsyth were made redundant on 17 and 20 February 2015 respectively. The redundancies occurred after each elected not to apply for other positions created as a result of restructuring within the limited partnership business.

[8] Without going into the detail for present purposes, I am satisfied that the evidence strongly suggests Mr Rex Soper was beginning to take preparatory steps to set-up a business in competition to the limited partnership as early as 18 July 2014. That was two months before the separation agreement was signed. The new company that emerged was called NZ Hardware Ltd. That was incorporated on 3 March 2015.

[9] In the period leading up to the incorporation of NZ Hardware Ltd, meetings were held in New Plymouth on 17 August 2014 and 14 February 2015 at which Mr Galvin and Mr Forsyth were present, as well as Mr Rex Soper and Mr Nick Soper. Other employees of the limited partnership were also invited to attend those meetings. I am satisfied from the evidence that there is a strong case that those meetings were designed to attract staff of the limited partnership to work in a new venture allied with the Soper interests, in an endeavour to use commercially sensitive information held by the limited partnership for the purpose of competition.

The search order application

[10] I deal first with the application for a search order. The application is made under r 33.2 and 33.3 of the High Court Rules. Rule 33.3 sets out the prerequisites for an order:

33.3 Requirements for grant of search order

The court may make a search order under rule 33.2 only if the court is satisfied that—

- (a) an applicant seeking the order has a strong prima facie case on an accrued cause of action; and
- (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
- (c) there is sufficient evidence in relation to a respondent that—
 - (i) the respondent possesses relevant evidentiary material; and
 - (ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.

[11] On the evidence, I am satisfied that there is a strong prima facie case raised by the evidence filed on behalf of the Banks' interests to demonstrate that the limited partnership has actionable claims against each of the defendants. The claim against Hardware Connections Ltd is based on breach of various terms of the limited partnership agreement, the shareholders agreement and the separation agreement which relate to confidentiality of information, non-competition and other protective covenants.

[12] A second claim is made for unlawful use or disclosure of confidential information, for the purpose of establishing and operating a business in competition with the limited partnership. There are also claims of breaches of confidential duties and good faith owed by various persons, including Mr Rex Soper and Mr Nick Soper, to the limited partnership.

[13] The claims as outlined in a Statement of Claim and in counsel's memorandum in support of the applications are much more extensive than that to which I have referred but that short summary is sufficient for present purposes.

[14] The second question is whether there is evidence of a potential or actual loss or damage suffered by Sopers MacIndoe & Banks LP.

[15] I am satisfied that the loss or damage potentially (and to an extent actually) suffered by Sopers MacIndoe & Banks LP as the trading entity, will be serious if a search order were not made.

[16] The third question is whether there is sufficient evidence that the respondents possess relevant evidential information and there is a real possibility that such information might be destroyed or made unavailable for use in anticipated Court proceedings or in the present proceeding if that were to go to trial.

[17] An issue arises as to whether this claim can be distinguished from that with which I dealt in *E-Blended Learning Solutions Ltd v Devaney*.¹ I consider that the degree of preparation and deliberate conduct evidenced in the affidavits on the part of the Soper interests gets the plaintiffs over the threshold to establish those elements.

[18] In those circumstances, I am satisfied that a search order should be made.

[19] As a result of discussions with Mr Hughes, I consider that some adjustments should be made to its terms. I intend to outline those amendments that will be necessary before I approve the order. A further draft order can be filed later this morning and put before me for approval over the luncheon break of the murder trial over which I am presiding.

[20] The first point concerns the names of the independent solicitors who will attend at the five premises at which it is proposed to search for information, all of which is contained in computer form. For each of the five premises it will be necessary to name a specific independent solicitor who will attend, and also name the person who will attend as solicitor on behalf of the plaintiffs at each site. The order should also set out the names of the forensic personnel who will attend at each address to execute the order under supervision of the independent solicitor.

[21] The order should also make it clear that the items to be searched and seized must be cloned and returned to the defendants individually in respect of each

¹ *E-Blended Learning Solutions Ltd v Devaney* [2012] NZHC 2294.

location from which seizure has taken place within 24 hours of seizure being effected.

[22] Subject to those qualifications, I am prepared to make a search order on the basis of the undertaking as to damages that have been filed.

[23] The next issue concerns the return date. The return date of the application will be 9am on 25 November 2015 in the High Court at New Plymouth. The order shall state that any discharge or variation application with affidavits in support shall be filed and served by 3pm on 24 November 2015. Any applications (including the present), shall be called before me at that time. If it is likely that a defended hearing will be required, I intend to transfer the proceeding to Auckland for hearing of any such applications.

Interim injunction application

[24] Turning to the application for interim injunctions, the test set out in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*² applies. That test requires a marshalling of evidence to determine whether there is a serious question to be tried and where the balance of convenience lies. I must then stand back and consider where the overall justice of the case lies.

[25] As discussed with Mr Hughes, I am not prepared to make an order at this stage which has the effect of preventing NZ Hardware Ltd from carrying on any business that it has created. What I am prepared to do is to make orders requiring that company to desist from certain conduct, pending further order of the Court. I am satisfied that both the balance of convenience and the overall interests of justice require that course.

[26] My view in relation to the serious question to be tried has already been expressed in terms of the search order application.

[27] I am prepared to make orders in terms of para 2(b), (c) and (d) of the application for an interim injunction. I adjourn the applications so far as paras 2(a),

² *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.

(f) and (e) are concerned. They may be pursued further at next call if counsel considers it appropriate to do so, on the basis of the information provided as a result of the search.

[28] Again, those orders are made on the basis of the undertaking as to damages filed in Court. I shall approve a draft order when submitted later today. The orders may be executed once sealed by the Court.

Affidavit of Mr Gray

[29] The final question concerns an application for an order limiting service of an affidavit of Mr Gray on solicitors acting for the defendants. The names of any solicitors are not known at this stage.

[30] The affidavit is important in relation to the question of loss and I am not prepared to withhold it from the defendants generally. I am prepared to redact the confidential information that is intended to be protected in relation to the plaintiffs' current market activities.

[31] An order is made that a redacted copy of Mr Gray's affidavit (in a form to be approved by me) shall be served on the defendants. An unredacted version shall be served on solicitors instructed on behalf of the defendants as soon as they are known. The unredacted version will be subject to those solicitors giving an undertaking that they will not distribute the unredacted version to their clients, pending further order of the Court.

General

[32] All documents required to be served in respect of the present proceeding, including a copy of this judgment, shall be served at the same time as the search order is executed.

[33] Costs reserved.

P R Heath J