

**ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION
DISCLOSED IN PROCEEDINGS**

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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV 2019-485-000570
[2019] NZHC 2609**

IN THE MATTER Of a claim for breach of confidence, breach
 of copyright and application for interim
 injunction

BETWEEN COMMERCE COMMISSION
 Plaintiff

AND UNKNOWN DEFENDANT(S)
 Defendant

Hearing: 09 October 2019

Appearances: M R Heron QC and C E M Agnew-Harington for the Plaintiff
 No appearances for the Defendant(s)

Judgment: 14 October 2019

REASONS FOR JUDGMENT OF GWYN J

*This judgment was delivered by me on 14 October 2019 at 3.00pm and
Re-delivered at 11am on 16 October 2019 as per Minute of Gwyn J of 16 October 2019
Pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

Counsel/Solicitors:
M Heron QC, Auckland
Copy to:
M Borrowdale, General Counsel, Commerce Commission, Wellington

Introduction

[1] On 9 October 2019, I heard the Commerce Commission's urgent application for an interim injunction. The papers were filed on 8 October 2019 on a without notice basis.

[2] In this judgment I provide my reasons for granting the application and for making the orders which I made on 9 October 2019, which are reproduced in the appendix to this judgment.

Background

[3] The Commerce Commission was established under the Commerce Act 1986 and is a Crown entity for the purposes of s 7 of the Crown Entities Act 2004. It exercises a range of functions under the Commerce Act and several other statutes. The Commission's most significant functions, for the purposes of this application, are:

- a) Investigation of potential breaches of the Commerce Act 1986 (Parts 2 and 3), Fair Trading Act 1986, and the Credit Contract and Consumer Finance Act 2003 (CCCFA), together with any enforcement action required, which may include commencing civil or criminal proceedings;
- b) The conduct of competition studies under Part 3A of the Commerce Act. The Commission commenced its first competition study in relation to the retail fuel market following a direction from the Minister of Commerce in December 2018;
- c) Determining applications for clearance or authorisation of mergers or restrictive trade practices under Part 5 of the Commerce Act. This may also include representing the public interest in any appeals from the Commission's determination;
- d) Regulation of industries under Part 4 of the Commerce Act. This is limited to industries where competition is limited, and likely to remain limited. At present this includes Transpower, electricity distributors,

gas distributors, and airports;

- e) Industry specific regulation of telecommunications services under the Telecommunications Act 2001 and of aspects of the dairy industry under the Dairy Industry Restructuring Act 2001;
- f) Investigation of potential breaches of industry specific regulation and/or regulations made under Part 4 of the Commerce Act, together with any enforcement action required, which may include commencing civil or criminal proceedings.

[4] The majority of the information the Commission receives in carrying out its functions is not in the public domain. The nature of its work means that the Commission deals in a wide and complex range of confidential information, frequently including:

- a) Commercially sensitive information;
- b) Market sensitive information, including information not known to the public that may affect the value of shares in listed companies;
- c) Information from confidential sources, including informants, whistle blowers and parties granted immunity from enforcement action;
- d) Legally privileged information, including interviews with witnesses for the purposes of pending litigation;
- e) Investigative information, the disclosure of which may compromise ongoing, current and future investigations; and
- f) Personal information relating to identifiable individuals.

[5] The Commission, in carrying out its various functions, conducts a multitude of interviews, including both compelled and voluntary interviews, as well as consultation hearings.

[6] Not all interviews are transcribed but the Commission does generally transcribe them where:

- a) Litigation is contemplated;
- b) The interview is significant, or relates to a matter of high importance;
- c) The interview is likely to be requested by the subject or a third party; or
- d) It is necessary for some other purpose, such as to capture and use testimony of high evidential value, or to particularise in the written interview record the confidential material contained in the interview.

[7] Consultation hearings, usually referred to as conferences, are held by the Commission in the course of its competition studies, clearance and authorisation, and regulatory work. In many cases the Commission will hold part of the conference in public, and then part of the conference in a closed "confidential session". All sessions of a conference will be transcribed. Transcripts of public sessions of a conference will usually be posted online within a few days of the conference, to assist parties in making post- conference submissions.

[8] Interview and consultation hearing transcripts are sometimes held on the equipment used by contractors providing services to the Commission. Typically, the terms of engagement of such contractors impose obligations of security and confidentiality.

[9] On 30 September 2019, computer equipment was stolen from the home of one of the Commission's service providers (Stolen Goods). The Stolen Goods hold data, documents, recordings and information belonging to the Commission that are confidential, not within the public domain, and subject to non-disclosure obligations (confidential electronic material).

[10] Notwithstanding the contractor's obligations of security and confidentiality it appears that the confidential electronic material was not password protected, with the

consequent risk that any person coming into possession of the equipment could access that material.

[11] As at the date I heard this application, the exact nature and content of the confidential electronic material was not entirely certain. The Commission was endeavouring to determine what confidential electronic material could have been contained on, or available through, the Stolen Goods. However, to date, it has been able to determine that at least some (and potentially, the majority) of the confidential electronic material is information with one or more of the characteristics referred to at paragraph [4] above.

[12] Since becoming aware of the theft and the potential for disclosure of the confidential electronic material, the Commission has taken a number of urgent steps including engaging with the New Zealand Police and attempting to track and secure the Stolen Goods and the confidential electronic material, and on 8 October 2019, issuing a notice under s 100 of the Commerce Act 1986 forbidding disclosure of information obtained as a result of the theft.

Threshold for interim injunction

[13] The three questions I must decide in considering whether to issue the interim injunction sought are:

- a) Is there a serious question to be tried?¹
- b) Does the balance of convenience favour the granting of an interim injunction?²
- c) Does the overall justice of the matter favour the granting of an interim injunction?³

¹ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL); *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 (CA).

² *Klissers* at 142.

³ *Klissers* at 142.

Is there a serious question to be tried?

[14] The plaintiff pleads two causes of action, breach of confidence and breach of copyright. As to the first, the elements of an action for breach of confidence were explained by McGarry J in *Coco v A N Clarke (Engineers) Ltd*:⁴

“Three elements are normally required if ... a case of breach of confidence is to succeed. First the information itself ... must ‘have the necessary quality of confidence about it’. Secondly, that information must have been imparted in circumstances importing an obligation or confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”

Does the information have the requisite characteristic of confidence?

[15] With the exception of transcripts of public meetings, the transcripts concerned are of confidential meetings or interviews and will involve a variety of confidential subject matter (personal, commercial, legally privileged and so on). I am satisfied that the confidential electronic information does have the requisite characteristics of confidence.

Was the information supplied in circumstances that suggest an obligation of confidence?

[16] Again, with the exception of transcripts of public meetings, it is clear that the information was provided to the Commission with an expectation that it would be held in confidence and such an obligation of confidence was assumed by the Commission. Statutory restrictions on disclosure by the Commission reinforce that conclusion.⁵

⁴ *Coco v A N Clarke (Engineers) Ltd* [1969] RPC 41 (Ch) at 47. See also *Skids Programme Management Ltd v McNeill* [2012] NZCA 314, [2013] 1 NZLR 1 (CA) at [76]-[80].

⁵ Section 106(7) of the Commerce Act 1986 provides that “No court or other person shall be entitled to require any member of the Commission, or any employee of the Commission or any other person present at any meeting of the Commission, to divulge or communicate any information furnished or obtained, documents produced, obtained or tendered, or evidence given, in connection with the operations of the Commission.”

Is there likely to be unauthorised use of the information?

[17] As at the date I heard this application the identity of the person or people who stole the confidential electronic equipment, or their motivation in doing so, was unknown. The Police investigation into the theft was at a relatively early stage. However, the possibly targeted nature of the theft may indicate an intention to unlawfully disseminate the information contained on the Stolen Goods. The necessary publicity surrounding the theft has in general terms outlined the nature of the stolen material, its sensitivity and thus its potential value. The risk of unauthorised use is exacerbated by the fact that the Stolen Goods are not password protected.

Public interest considerations

[18] The Commerce Commission submitted that this case involves no aspect of “the workings of Government” in the confidential electronic information, such that a public interest consideration is required to be specifically considered.⁶ In the context of this interlocutory application I accept that is the case.

Freedom of expression

[19] In terms of s 14 of the New Zealand Bill of Rights Act 1990, the Commission submits that the restriction sought is proportionate to the objective: the Commission does not seek to prevent anything but the dissemination or copying or use of the confidential information, as opposed to discussion or debate about the investigations concerned or the incident leading to the breach of confidence. I accept that submission.

[20] I am satisfied that the breach of confidence claim alone provides a sufficient basis for my assessment as to whether there is a serious question to be tried. In the circumstances of urgency it was not therefore necessary to consider the second cause of action, breach of copyright.

⁶ *Earthquake Commission v Krieger* [2013] NZHC 3140, [2014] 2 NZLR 547 at [36] to [41].

Does the balance of convenience favour the granting of an interim injunction?

[21] The Commission has a well-founded fear that, absent restraint, the confidential electronic material will be used or disseminated in some way in breach of the Commission's confidence and copyright. The Commission's evidence before me was that disclosure of the confidential electronic material could have serious consequences for the Commission and other parties, including individuals and entities who make up the subject of the Commission's investigations and inquiries; individuals and entities who have provided the Commission with information in various capacities. Ultimately such disclosure has the potential to erode trust and confidence in the Commission's ability to protect confidential information. That in turn may undermine the Commission's ability to effectively conduct its investigations and inquiries in the public interest.

[22] The interim injunction restraining relevant persons from sharing, publishing or distributing the confidential electronic material is sought in addition to the prohibition on publication provided by the 8 October s 100 Order issued by the Commission. A s 100 Order is a form of confidentiality order over documents, information or evidence regarding investigations and inquiries before the Commission. The Order made on 8 October 2019 encompasses some but not all of the confidential electronic material.

[23] In addition to that limitation, while the Commission might ultimately seek prosecution in respect of any identified breach of the s 100 Order,⁷ the injunction sought from this Court would enable restraint of further dissemination or publication of the confidential electronic material.

[24] In these circumstances, I concluded that the balance of convenience favoured the granting of an interim injunction and that the plaintiff would suffer serious and likely irreparable loss or harm, not compensable by damages, if the injunction were not granted and there was further unauthorised disclosure of the confidential electronic material.

⁷ The penalty for breaching an order under s 100 is a maximum fine of \$4,000 for an individual and \$12,000 for a body corporate: section 100(4).

Does the overall justice of the matter favour the granting of an interim injunction?

[25] I was satisfied the overall justice of this case favours the issuing of an interim injunction. My reasons were:

- a) At this stage I can see no legitimate basis upon which a recipient of the confidential electronic material can release the information acquired by him or her;
- b) In light of the circumstances outlined by the Commission, it is possible, if not likely that, unless restrained by Court Order, such a recipient will release the information that he or she has required;
- c) The Commission should have the opportunity afforded by an interim injunction to preserve its position and persuade a Court in a substantive hearing, of the merits of its position.

Unnamed defendants

[26] Because the identity of the person(s) who has stolen the confidential electronic material and who may now have that material is not known, it is not possible to name him/her or them, as defendants. There is precedent for the grant of an injunction in such circumstances. See for example, *Bloomsbury Publishing Group Ltd v News Group Newspaper Ltd*;⁸ *Tony Blain Pty Ltd v Splain*;⁹ *Brash v Doe*;¹⁰ *Slater v Unknown Defendants*;¹¹ and *Earthquake Commission v Unknown Defendants*.¹²

[27] In the *Earthquake Commission* case Collins J relied on *Tony Blain Pty Ltd v Splain* to order relief against persons not identified at the time of the Court order.¹³ In the *Blain* case the defendants were those who would be selling counterfeit or

⁸ *Bloomsbury Publishing Group Ltd v News Group Newspaper Ltd* [2003] EWHC 1205, [2003] 1 WLR 1633 (Ch).

⁹ *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185 (HC).

¹⁰ *Brash v Doe* HC Auckland CIV -2016-485-2605, 16 November 2006.

¹¹ *Slater v Unknown Defendants* [2014] NZHC 2157.

¹² *Earthquake Commission v Unknown Defendants* [2013] NZHC 708.

¹³ At [20].

unauthorised merchandise at Metallica and Paul McCartney concerts that were to take place in Auckland. The infringements had not yet taken place, but, as the Court said, in due course, the defendants would be known by their acts of infringement. In the *Earthquake Commission* case the defendants were said to have already carried out certain infringing acts but their identities were still unknown. This case has some similarities to both the *Earthquake Commission* case and *Brash v Doe* where the Court held that it could issue an injunction to prevent an unknown defendant from publishing emails sent to or from Don Brash.

[28] I am satisfied jurisdiction to make the order exists, notwithstanding that the defendant(s) cannot at this stage be identified with particularity. It is likely that, as the Police inquiry proceeds, the person(s) who stole the confidential material (and persons in subsequent receipt of that information, if any) will be identified. The Commission will then be in a position to serve that party or parties with the orders I have made and come back before this Court for further orders.

Undertaking as to damages

[29] As noted, the Commerce Commission is a Crown entity, subject to the provisions of the Crown Entities Act 2004, which limit its ability to incur financial obligations. In the circumstances of urgency under which this application was filed it was not possible for the Commission to ascertain the statutory ability or the willingness of the Commission's Board to provide an undertaking as to damages.

[30] While no named defendant has been identified at this stage, the orders sought by the Commission and granted by me provide for service of the orders on any potential defendant after they are identified. The Commission is to ensure it is in a position to address the question of an undertaking as to damages at that time.

Suppression

[31] For reasons of privacy and commercial sensitivity the Commission sought an order suppressing certain details in the material filed in the Court.

[32] The Court has inherent power, including in the civil context, to make non-publication orders binding against the public at large.¹⁴ The starting point in considering exercise of that power is the principle of open justice. I must strike a balance between that principle and the interests of the party.¹⁵

[33] In the circumstances outlined above, I granted an order, on an interim basis, suppressing certain information in the affidavit of Mr John Benjamin Hamlin, dated 9 October 2019.

Result

[34] The Commerce Commission has established that there is a serious question to be tried. I am also satisfied that the obligations of confidence which exist in relation to the confidential electronic material should be maintained through the grant of an interim injunction until determination of the substantive matter. In considering the overall justice, I am satisfied the importance of protection of confidential information, in this context and for this limited period, is in the public interest and justifies the order.

Costs

[35] Cost are reserved.

Gwyn J

¹⁴ See *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA); *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 and *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.

¹⁵ *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911.

Appendix

THIS COURT ORDERS:

[1] The “unknown defendants” referred to in these orders are those persons who gained unauthorised access to the confidential electronic information contained on or accessible via the goods stolen from the plaintiff’s contractor (**confidential electronic material**) and persons to whom that information is disclosed, distributed or otherwise made available without the consent of the plaintiff.

[2] Pending the determination of this proceeding or the further order of the Court, the unknown defendants by themselves, their servants or agents or companies under their control are restrained from:

- a) communicating to any other person;
- b) copying (including by placing on a website, or making available by link or similar);
- c) distributing, disseminating;
- d) issuing to any person, organisation, media outlet, group of persons, or the public;
- e) broadcasting or otherwise publishing;
- f) making an adaptation of;
- g) dealing with in any other way or form (other than for the purposes of return or offering up to the relevant Government authorities);
- h) authorising any of the actions referred to in (a) to (g) above in relation to any part of the confidential electronic information in their possession, power or control.

[3] Any person served with a sealed copy of these orders shall at the same time be served with a clear and succinct statement of his or her rights in connection with this proceeding. In particular, the statement is to explain the right to apply to the Court in terms of Order 5 (below).

[4] The plaintiff shall within 10 working days after service of these orders on any defendant file in the Court a report of the process of such service.

[5] That leave be reserved to any defendant to apply to the Court for rescission or variation of these orders on 24 hours' notice.

[6] That leave be reserved to the plaintiff or any other person affected by these orders to apply to the Court for such further or other orders as may be just.

[7] That information disclosed in these proceedings relating to the contractor, the nature of the services provided by the contractor to the Commission, and particulars of the theft not disclosed by the Police be suppressed. In particular, suppression applies to those matters referred to in paragraphs 19, 28 and 29 of Mr Hamlin's affidavit of 8 October 2019. In addition, the first page of the Deed, and the first two pages of the Contract for Services in Exhibit A are suppressed, as is any text in square brackets (i.e. "[text]") in Exhibit E to that affidavit.