

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 109
ARC 15/10**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

BETWEEN EVOLUTION E-BUSINESS LIMITED
Plaintiff

AND BENJAMIN SMITH
Defendant

Hearing: 27 - 30 June 2011 and 1, 4 and 5 July 2011

Appearances: Mr Dean Organ and Mr Michael McFadden, advocates for the
plaintiff
Defendant in person assisted by Mr Brian Smith JP

Judgment: 26 August 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] In this proceeding, the plaintiff (Evolution) seeks an award of damages and other relief against its former employee, Mr Benjamin Smith, for alleged breaches of his employment agreement, in particular, alleged breaches of his duties of good faith and confidentiality. The principal allegation made against Mr Smith is that during the course of his employment he provided Evolution's former joint-venture partner, Transactor Technologies Ltd (TTL), with an affidavit which was used by TTL in litigation against Evolution. There were other allegations also which I will need to deal with in the body of this judgment. Mr Smith denies all the allegations made against him and claims that he provided the affidavit in January 2009 after becoming aware that he had been required to perform work in contravention of the terms of a

High Court injunction which TTL had obtained against Evolution on 22 December 2008.

[2] The plaintiff initially commenced this proceeding in the Employment Relations Authority (the Authority) but on 16 February 2010, before the Authority had commenced its investigation, Judge Travis granted an application by Mr Smith to have the matter removed in its entirety to this Court.¹ The application was granted pursuant to s 178(3) of the Employment Relations Act 2000 (the Act) on the grounds that the Court was satisfied that an important question of law was likely to arise in the case other than incidentally and that it was appropriate to order the removal of the entire matter to the Court. Essentially, Judge Travis defined that question of law as whether the duty of confidentiality extended to information about unlawful acts and whether there was any confidence in the disclosure of an iniquity. Judge Travis referred at [16] to the equitable defence that there is “no confidence in the disclosure of an [iniquity] (*Gartside v Outram*²)”, noting that the principle had been recognised by the High Court in *European Pacific Banking Corporation v Fourth Estate Publications*³ and the Court of Appeal in *European Pacific Banking Corporation v Television New Zealand Ltd.*⁴

[3] At the time of the removal, and indeed right up until 23 February 2011, Mr Smith was represented in this litigation by Mr Anthony Drake, Mr Michael O’Brien and Ms Nura Taefi of Kensington Swan but on that date I granted an application for Kensington Swan to withdraw from the proceedings as the solicitors on the record. The application was based upon the grounds that Mr Smith then owed Kensington Swan a significant sum on account of outstanding legal fees and disbursements for services rendered in connection with the litigation. From that point on Mr Smith has acted in person assisted by his father, Mr Brian Smith.

Background

[4] Evolution was established in 2000 as an electronic business services provider. The managing director and majority shareholder is Mr Henry Norcross who has been

¹ *Smith v Evolution E-Business Ltd* [2010] NZEmpC 9.

² (1856) 26 LJ Ch 113.

³ [1993] 1 NZLR 559.

⁴ [1994] 3 NZLR 43.

with the company since its inception. The chairman of Evolution since November 2007 has been Mr Christopher Johnson who is also a director of a number of other technology companies. Another witness for the plaintiff was Mr Benjamin Fellowes, who up until March 2009, was Evolution's global implementation manager, responsible for managing projects for the company's international customers.

[5] TTL was formed in November 2002 as a specialist business software support provider. The managing director is Mr John Norrie. Another company that featured prominently in the case was MarketSmart International (NZ) Ltd (MarketSmart). MarketSmart was a software company formed by Mr Norrie in 1991. In 2002, Mr Norrie sold MarketSmart to an Australian public-listed company. At all material times, MarketSmart's general manager was Mr Paul Harper.

[6] TTL developed a new software system which it branded "Thor Transactor" (Thor). Thor was described as a core data processing engine and a suite of integrated modules that enable the retrieval of data from a variety of sources such as EFTPOS terminals, point-of-sale systems and web environments. The Thor system can be used for processing shopping data so as to add rewards under a loyalty program or to allow rewards to be redeemed at the point-of-sale. The system can also be used in the management of prepay or stored value payment card programs such as gift cards. At all material times TTL was, and still is, the licensee and owner of the Thor software system.

[7] Benjamin Smith, the 25-year-old defendant was employed by Evolution as its technical manager between 5 May 2008 and 13 February 2009. His terms and conditions of employment were set out in an individual employment agreement dated 21 April 2008. Prior to being employed by the plaintiff, Mr Smith had worked for TTL between January 2007 and May 2008.

[8] Another individual whose name figured prominently throughout the hearing was Mr Andrew Macleod. Mr Macleod had also worked for TTL and in May 2008 he left and took up full-time employment with Evolution. It is not clear exactly when Mr Macleod ceased working for Evolution but the evidence was that for a few

months around the time of the litigation between Evolution and TTL, Mr Macleod was engaged by TTL on a contract basis to assist that company.

The joint-venture

[9] In June 2004, Evolution and TTL became partners in a joint-venture. The purpose of the joint-venture was to market and distribute the Thor software system to retailers to enable them to develop unique loyalty and gift programs. The agreement was that TTL would allow the joint-venture the use of its proprietary software, namely the Thor software system, along with technical and marketing support, while Evolution was to be principally responsible for managing the retail customers through marketing, sales, billing and administration. Under the agreement, Evolution was required to maintain confidentiality in relation to the Thor system and was precluded from allowing any other party access to the system.

[10] Sometime in March or April 2008, Mr Smith submitted a resignation letter to TTL informing Mr Norrie that he had been offered another position with a web sales company in Auckland. Mr Norrie described the developments that then led up to Mr Smith's employment with Evolution:

7. In or around early May 2008, Mr Andrew Macleod, who had been the Business Development Manager for TTL, was seconded to the Plaintiff (by mutual agreement of TTL and the Plaintiff), for an intended period of 3-6 months to act as a stand-in for the general manager of the Plaintiff, Denise Donald, whose employment was abruptly terminated by the Plaintiff.
8. Mr Macleod informed Mr Norcross that the Defendant was leaving TTL and since the Defendant had been dealing with the joint-venture clients and had all the requisite knowledge of the joint venture business, it would be a very good idea if the Plaintiff were to take on the Defendant.
9. Mr Norcross was in full agreement to the idea as there was an urgent need to employ a person of the Defendant's background. The Defendant agreed to the offer of employment by the Plaintiff and was then employed by the Plaintiff as the Technical Manager. The Defendant began work with the Plaintiff sometime in mid-May 2008.

[11] Mr Norcross told the Court that the joint-venture was terminated unlawfully by TTL in October 2008 and TTL gave notice to clients that unless they migrated their gift and loyalty programs to the direct ownership and control of TTL within a few weeks then their programs would no longer operate. In his evidence, Mr Norrie

gave a fuller account of his version of the joint-venture breakup. He indicated that a number of differences had arisen between the parties relating to Evolution's operation of the joint-venture, particularly in relation to financial matters. He referred to a series of failed agreements over the period July to September 2008 as TTL and Evolution endeavoured to resolve their commercial differences. But he told the Court that the final straw that led to TTL's termination notice was Evolution's blatant dishonour of a signed mediation settlement agreement dated 5 September 2008. Mr Norrie said that on 23 October 2008, TTL gave notice terminating the joint-venture agreement. Clients of the joint-venture were formally advised to make alternative arrangements for a software platform to operate their gift card and loyalty programs. He explained that both venture partners were free to make representations to the joint-venture clients offering them continuity of business on their respective software platforms.

The interim injunction

[12] Mr Norcross told the Court that after the termination of the joint-venture, Evolution began preparing to pursue "appropriate legal remedies" and wanted to prevent TTL from "turning off the Thor system as they had threatened to do in writing to clients and to Evolution". He, therefore, asked Mr Smith to work with MarketSmart to explore the possibility of migrating the ex joint-venture clients to Evolution. MarketSmart operated its own propriety software (the CIS system) and competed directly against TTL. Mr Norcross said that he was subsequently advised by Mr Smith that he believed it was possible to migrate some of Evolution's programs immediately but others would need more time.

[13] The next development in the narrative occurred on 18 December 2008 when TTL, through its lawyers Bell Gully, issued proceedings in the High Court at Auckland against Evolution and MarketSmart. The statement of claim recorded that following the termination of the joint-venture, TTL and Evolution had reached an interim agreement, designed to assist former joint-venture clients, under which temporary access by Evolution to the Thor system would be permitted until 13 February 2009. It was then alleged that Evolution had proceeded to misuse the Thor system by copying and reproducing it without TTL's consent and by providing copies and/or access to the Thor system and data bases to MarketSmart. Also on 18

December 2008 an application was made to the High Court for an interim injunction against both Evolution and MarketSmart pending the final determination of the proceeding. A lengthy affidavit was filed by Mr Norrie in support of the injunction application in which he deposed, inter alia, to having been contacted by a number of clients who had received letters from Evolution which stated that it had a new agreement for transaction processing with MarketSmart asserting that “the Thor engine was originally based on the MarketSmart product so there is direct compatibility of technology.” Mr Norrie said that this statement was incorrect and he was very concerned as he believed that the only way Evolution and MarketSmart could offer continuity of service to the joint-venture clients was if they obtained a copy of the Thor software and joint-venture data base.

[14] The interim injunction application came before his Honour Justice Harrison on 22 December 2008. Counsel for TTL were Mr Murray Tingey and Ms Jenny Cooper. Mr Edward Grove appeared for Evolution and MarketSmart was represented by Mr Brian Stewart. In attendance on behalf of Evolution were both Mr Norcross and Mr Johnson. Before ruling on the injunction application, Justice Harrison took evidence on oath from Mr Norcross and a transcript of his evidence was appended to a minute issued with the injunction. Part of the transcript includes the following exchange between his Honour and Mr Norcross:

- Q.** Have you provided to any parties any copies and adaptations of the Thor Transactor software and programmes or any other material derived from that software?
- A.** Yes.
- Q.** To whom have you provided that information or details?
- A.** The whole server – I’m not too sure of the technical aspects – the server was migrated from ICONZ after a threat of termination to customers...
- Q.** To whom, though, did you supply those details?
- A.** To MarketSmart.
- Q.** Has MarketSmart used those details to its advantage to your knowledge?
- A.** No, and they no longer have them.
- Q.** What was the fate of those details?

- A. They were deleted and destroyed.
- Q. By whom and when?
- A. I'm not sure of the extent but I know a back-up was taken; nothing was completely copied.
- Q. There was some detail?
- A. Yes, it's quite a long story.
- Q. Tell me what happened to it, to your knowledge?
- A. To my knowledge some data was backed-up which is client data and we tried to ring-fence that computer and that data so that we could have customers' [programs] still running.
- Q. To your knowledge is MarketSmart using those details for its own purposes?
- A. Definitely not.
- Q. To your knowledge is MarketSmart using those details for the benefit of any party to whom you might be related, directly or indirectly?
- A. Not at all.

[15] Justice Harrison then proceeded to make an interim injunction order by consent against both defendants. The order made against Evolution was in these terms:

- (a) Pending further order of the Court:
- (i) The first defendant [Evolution] not provide access to, use, disclose, adapt or copy the Thor Transactor software and the plaintiffs' programs to any person or for any purpose except for providing services until 13 February 2009 to clients of the former joint venture between the first plaintiff and the first defendant; ...

The order made against MarketSmart provided:

- (ii) The second defendant (MarketSmart) not access, use, disclose, provide access to, adapt or copy the Thor Transactor software and the plaintiff's programs to any person or for any purpose.

[16] The records produced at the hearing show that the order for interim injunction along with his Honour's minute and the transcript of evidence were faxed from the High Court to Bell Gully (solicitors for TTL), MacLean Law Ltd (solicitors for Evolution) and Simpson Western (solicitors for MarketSmart) at approximately

3.00 pm on 22 December 2008. The same documents were emailed by MacLean Law Ltd to Mr Norcross and Mr Johnson of Evolution at 11.22 am on Tuesday, 23 December 2008.

[17] Mr Norcross explained Mr Smith's role with Evolution in these terms:

14. As Ben was the primary individual leading this project in New Zealand and since he was responsible for coordinating the work and advising on the best approach to many parts of the database migration much of the knowledge of what was done and what needed to be done was held and understood by him...

Given his role, it was obviously critical that Mr Smith should be informed of the High Court injunction order as quickly as possible. The timing of subsequent events, therefore, assumed some significance at the hearing.

[18] Mr Smith said, in evidence which was not challenged, that he first heard of the injunction on the afternoon of 23 December 2008 when he received a telephone call from Mr Macleod (who was at that time carrying out work on contract for TTL). He said that Mr Macleod called him on a personal basis to check whether he knew about the injunction that TTL had obtained against Evolution and MarketSmart the previous day. Mr Smith told the Court that that was the first time he had heard of it and so he called Ms Helen Wrench, one of Evolution's senior staff members, to check the situation. He followed up the telephone conversation with an email to Ms Wrench which read:

Hey Helen,

As we discussed on the phone earlier, [I]'ll paraphrase the message delivered to me from Andrew Macleod.

Main points:

1. TTL had won the injunction.
2. No Evolution employees are legally allowed to access the Thor database through an application (like Toad, SQL Developer, or SQL Plus for example) in order to analyse table structure, perform data extracts, review/alter procedures etc

Please note: this area is VERY vague, as many of my daily tasks that [I] perform to service our clients involve direct access to the database and running many [ad hoc] investigatory queries and small data extracts etc, however very similar acts would be performed through

any further work [I] may perform in relation to extracting client data for the purpose of migrating clients to a new technology [provider].

3. I would be personally liable for any acts [I] perform that break the terms of the injunction
4. TTL have methods of monitoring who accesses the system and what they do while in the database

You'll appreciate my obvious concern here, and also a certain amount of disappointment that [I] had not been informed of this by my own company DIRECTLY after the injunction was put in place considering the work [I]'ve been tasked with.

Ben Smith
Technical Manager

[19] Ms Wrench's initial response to Mr Smith's query was to say that Mr Norcross had told her that Evolution had won the injunction and that it was business as usual. Mr Smith told her that he, nevertheless, had concerns about continuing with the work the company had instructed him to carry out and so he asked Ms Wrench to go back and check the position with Mr Norcross. In the meantime he stopped working on the migration.

[20] Later, during the afternoon of Tuesday, 23 December 2008, Mr Smith received an email from Mr Macleod which was also sent to other employees of Evolution, namely, Mr Benjamin Fellowes, Ms Elouise Botha, and Mr Chris Qureshi, attaching a copy of the injunction order. The email read:

Hi all FYI

Please read the injunction attached.

John has asked me to pass this on to each of you personally as he understands that some of you may not have a copy and could already be in contempt of this injunction. My understanding is that this injunction could [affect] you all as employees of Evolution on an individual basis.

If you are in doubt about how this may [affect] you personally please take some independent legal advice.

Best regards
Andrew

Mr Smith told the Court: “Having read the order, it appeared to me that what I had been doing up until I received Andrew’s phone call was contrary to the injunction order.”

[21] Ms Wrench called Mr Smith back that same afternoon and told him that he should carry on with what he was doing except that he should not access the Thor Transactor processing system. That call came after Mr Smith had received the injunction from Mr Macleod and so he told Ms Wrench that he had seen a copy of the injunction order and he outlined to her what the order said. He explained to her that it appeared to him that working on the material he had already copied from Thor for the purpose of the migration was contrary to the injunction order. He told Ms Wrench that he was not prepared to carry on without independent legal advice that it was safe for him to do so.

[22] Early on the morning of Wednesday, 24 December 2008, Mr Norcross sent an email to Evolution’s staff which was his first formal advice since the issuance of the injunction order on 22 December. The email commenced:

Hi Guys As you are aware, EVO is in a dispute with Transactor Technologies Limited (“TTL”), the provider of some of the software EVO uses in the transaction processing for your gift and loyalty program. By consent between EVO and TTL, the High Court yesterday (sic) issued interim orders putting the parties into a “holding pattern” (as the [Judge] put it), until at least mid-February.

...

We look forward to working with you on a “business as usual” basis over this period, and to carrying our relationship forward long-term.

...

[23] Mr Smith told the Court that Mr Norcross made it clear that he considered that the “business as usual” direction would also include his work on the migration and he telephoned Mr Norcross and told him that he was not comfortable carrying on. Shortly after sending the email referred to in the previous paragraph, Mr Norcross forwarded to Mr Smith, Mr Fellowes and Mr Qureshi a copy of an email he had received from MacLean Law the previous morning enclosing the injunction order and the minute of his Honour Justice Harrison.

[24] Later still on the morning of 24 December 2008, Mr Norcross sent another email to Evolution's staff which stated:

Hello All. Just to avoid any doubt all the migration plans are on hold and any steps to run trials or implement an alternative platform of EVO's are on hold until we go back to court and review our position to ensure we do everything correctly. If customers want data to test or review we have to provide this to them.

Regards

Henry

[25] Mr Smith told the Court, in evidence which I accept, that at around this same point in time he was instructed by Ms Wrench to delete all the work he had done after the injunction had been issued. He did this using a Microsoft safe deletion program which he downloaded from the internet. He did not, however, delete work he had done prior to the issuance of the injunction. In this regard, he explained in his words: "In the three weeks leading up to the injunction order of 22 December 2008, I recall I was working furiously to 'fill the substantial gaps' between the MS (MarketSmart) solution and TTL's Thor Transactor platform."

The defendant's resignation

[26] The 25 and 26 of December 2008 were, of course, public holidays. On 27 December Mr Smith travelled to Thailand on three weeks' annual leave. He was due to return to work at Evolution on Monday, 19 January 2009. He told the Court that while he was on holiday in Thailand he realised that, "he didn't want to work for a company which would break the law and treat its staff so poorly" and so he decided to quit. He emailed his resignation to Mr Norcross on 5 January 2009. His email stated:

To Henry Norcross,

I am hereby handing in my resignation from employment as Technical Manager with e://volution E-Business Ltd. My final day of work will be Friday the 13th of February. I currently have no other job offers and will begin my job hunt once [I] return to New Zealand, [I] have however decided that my time with e://volution is over. It has been of huge value to me in working with this company and going through all of our recent struggles, and [I] appreciate the opportunity [I]'ve had.

Ben Smith

[27] On the same day, Mr Smith sent another email. It is not clear from the copy produced in evidence who the recipients were but one of them was Mr Macleod. The email and Mr Macleod's response figured prominently in the plaintiff's case. Evolution submitted they showed that at that stage Mr Smith had received a job offer to go back and work for TTL. That proposition was strongly denied by Mr Smith. His email read:

Hey guys,

Thailand is amazing, [I] can understand how you fell in love with the country John.

I've just sent through my resignation to evolution and [I]'ve decided to work a full 4 weeks once [I]'ve returned to ensure a proper hand over etc (think [I]'ve still got a few pesky morals and a smidget of responsibility to complete my role there)

My last day of work there will be on the 13th of Jan.

Let's talk more once [I]'m back in NZ and catch up for a coffee or something.

Ben Smith

[28] Mr Macleod's email reply of the same day stated:

[G]ood plan except with the space time [continuum] being what it is can you cram last day of work in before or on the 13th of JANUARY some days prior to your [actual] return and if so do you then do the 4 weeks in a [vacuum] jar somewhere suspended in time.

[I]s it possible you should just change your last day to sometime in February ,,,, maybe say the 13th

Let me know but you have to respond yesterday [because] [I]'m out till 2007

Andrew

P.S. does time travel give you an outy if you have an inny and does it make your eyes bleed??????

P.P.S.S.

Congratulations you are a winner good choice :)

P.P.P.

[29] Mr Macleod was not one of the scheduled witnesses in the case. He apparently now lives in Sydney and during a visit to Auckland while the hearing was progressing he telephoned Mr Smith to see how he was and Mr Smith asked if he

could come to Court to give evidence. No brief of evidence, in other words, had been compiled for Mr Macleod and he had very little warning that he was going to be a witness in the case. Apart from his expertise in computer technology, Mr Macleod explained to the Court that he is also an astrologer and he makes up his own astrology charts and graphs. I mention these matters because they help explain his tongue-in-cheek remarks over the “*space time continuum*” in response to the obvious error in Mr Smith’s email where he said that he had given four weeks’ notice on 5 January 2009 with his last day of work being 13 January. I will need to come back to Mr Macleod’s email in relation to the P.P.S.S.

The affidavit

[30] The evidence was that Mr Smith arrived back in Auckland from his holiday in Thailand on Friday, 16 January 2009. He returned to work on Monday, 19 January. That morning he received a call from Evolution’s chairman, Mr Johnson, who questioned him as to why he had resigned. He told Mr Johnson that he wanted to get out of the situation he was in and seek new employment. Mr Smith then sent an email to his work colleagues:

Hey Team,

I’ve had a chat with Chris J this morning and he’s raised the concern that I would take a position with TTL after my employment ceases with [E]volution.

I’d like to just let you know that although I most certainly still communicate openly with TTL (Andrew & John included) I have received no direct job offer from them, and do not intend to take a position with them.

I’m more than happy to admit that both Andrew and John have communicated to me that “[I’ll] always have a job with TTL” and that I appreciated having that safety net with the current job market, however a large part of my decision to resign was to remove myself from this legal situation, not place myself upon the other side of it!

Ben S.

[31] One of the tasks Mr Smith had to complete upon his return to work was a review of Mr Norrie’s affidavit dated 18 December 2008 which had been filed in support of TTL’s injunction application. On 20 January 2009, Mr Smith sent two emails to Mr Norcross with his comments on the affidavit. Mr Norcross told the Court that Mr Smith advised in his email that Mr Norrie’s claims were not correct

and that Evolution had conducted itself appropriately. In paragraph 19(iv) of the statement of claim, it is alleged that the emails in question indicated that Evolution's actions were "in fact not in breach of the Interim order dated 22 December 2009". The emails, however, did not make any statement in such terms. Referring to the email in cross-examination, Mr Smith said:

This email which I wrote I was speaking about the intentions of Evolution as they stood on 20 January whereas my concerns were about breaching court orders which were issued on 22 December 2008 before that.

Developing this point in cross-examination, Mr Smith referred to emails he had sent Mr Norcross prior to the granting of the injunction in which he had expressed disappointment and concern over the legal implications of the work he was carrying out and indicated, at one point that he would refuse to continue work on the migration.

[32] Either on 20 January or early in the morning of 21 January 2009, Mr Smith received a telephone call from Mr Macleod informing him that the case was going to trial or going to court. Mr Smith said that Mr Macleod had phoned him as a friend. He explained that TTL would need to subpoena him and call him to court and that potentially he could face contempt of court charges along with the plaintiff if it was found that he had knowingly and willingly helped to reverse engineer TTL's software after the injunction had been issued. Mr Smith continued in his evidence-in-chief:

37. Andrew said to me that another option for me would be to speak with Bell Gully, TTL's solicitors in the legal suit between TTL and the Plaintiff and MS (MarketSmart) and give them a written statement of events. He further advised that if I was willing to provide this, then TTL may provide me an indemnity that TTL will not bring any action against me personally for having unlawfully dealt with and/or used Thor Transactor.
38. I decided to heed Andrew's counsel and met with TTL's solicitors Bell Gully on 21 January 2009.
39. At my meeting with Bell Gully, I was given a copy of the injunction order complete with the minutes of Harrison J dated 22 December 2008. I was taken aback when I read the minutes of the Judge (Harrison J) in which the question and answer between the Judge and Mr Norcross were minuted in verbatim. Personally, I knew that Mr Norcross's answers to the Harrison J's questions were not entirely correct and did not reflect the true situation as I was fully aware that

(the confidential information) copies of the Thor Transactor software and other information were stored at other locations apart from what Mr Norcross asserted to the Judge.

40. In addition, I also knew that it was not true of Mr Norcross['] answers to the Judge's question if the details and confidential information were deleted and destroyed by MS as I was still working on the Thor Transactor materials in the days before and even after the date the injunction order was granted...
41. I was then advised by Bell Gully that it was in my own interest and benefit that I should be open and frank in my responses to their questions. At the end of the meeting, Bell Gully had very specifically said to me that in view of the works and jobs I had been doing for the Plaintiff in conjunction with MS against the background of the injunction dated 22 December 2008, TTL would have to subpoena me as a witness in the legal suit between TTL and the Plaintiff and MS.
42. Under those circumstances, I found myself in a very tight legal spot as I realised that I had been placed in a position of being personally accountable for breaches of the injunction order even if the tasks that I had undertaken were on the instructions of the Plaintiff.

[33] In cross-examination, Mr Macleod explained that he had contacted Mr Smith as a friend to explain that he may have a measure of personal liability. In the witness' words, "And Ben is old enough to be a son so if you want to look at my concern it's as a fatherly figure on a young naive man who may be involved in something that he shouldn't have been involved with and I'm asking him as someone I care for to take some legal advice." He confirmed referring Mr Smith to Bell Gully and he also told the Court that he informed Mr Smith that he should obtain independent legal advice and, in that regard, he had mentioned several firms of lawyers including Simpson Grierson. I accept Mr Macleod's evidence.

[34] Included in the documentary evidence produced at the hearing was an email from Ms Jenny Cooper of Bell Gully to Mr Smith dated 21 January enclosing a draft affidavit setting out the information Mr Smith had supplied her with. Mr Smith was asked to review the draft affidavit carefully and make sure that he was happy with it before signing. Ms Cooper confirmed the advice she had already given to Mr Smith that upon the signing of the affidavit, TTL would provide him with an indemnity against any personal liability. The email was copied to Mr Anthony Drake of Kensington Swan. Mr Smith told the Court:

43. The next morning on 22 January 2009, I sought the independent legal advice of Kensington Swan and on their advice, I made the decision to swear an affidavit and ‘come clean’ to somewhat mitigate my position. I [chose] to give the affidavit which documented my role and actions around the time of the injunction as, ironically, I wanted to keep out of court and minimise any legal involvement.

[35] Expanding in cross-examination on his reason for making the affidavit, Mr Smith said:

My justification for providing the affidavit was that I found myself in a very tight legal spot as I realised I had been placed in a position of being very personally accountable for breaches of the injunction order even if the tasks I had undertaken were on the instructions of the plaintiff.

[36] After Kensington Swan had made some relatively minor alterations to the draft, the completed affidavit was sworn by Mr Smith before Mr Drake on 22 January 2009. It was then returned to Bell Gully and filed immediately in the High Court in support of an ex parte application by TTL for interim preservation orders. The High Court acted promptly and issued interim preservation orders (an Anton Piller order) on that same day, 22 January 2009. The introduction to the orders made by his Honour Justice Venning records that the ex parte application was supported by Mr Norrie’s affidavit of 18 December 2008 and the affidavits of Mr Smith and Mr Campbell Bryan McKenzie. The orders authorised named individuals to enter Evolution’s premises, search all computers and electronic devices and make copies of documentation relating to the Thor software.

The aftermath

[37] Emails were produced dated Friday, 23 January 2009 confirming that Mr Smith had met earlier that day with Mr Johnson and Mr Norcross and Evolution had removed his cell phone. Mr Smith asked that any further communications regarding his employment should be directed to Mr Drake at Kensington Swan. Mr Norcross suggested a meeting the following Wednesday when they could “work out a tidy exit as per your resignation”. Mr Smith told the Court that he was directed by Evolution to go on garden leave with immediate effect to serve out the balance of his notice period up until 13 February 2009.

[38] Mr Norcross said, “We met with Mr Smith on 28 January to review the [company’s] position on the reverse engineering claims and to [update] him on this matter.” Mr Smith said in evidence that he was accompanied at the meeting by Ms Laura Driscoll, a solicitor from Kensington Swan. He described the conduct of Mr Norcross, Mr Johnson and Evolution’s advocate, Mr Dean Organ, at the meeting as “extremely hostile and belligerent”. Mr Smith told them that they could email to him the questions they wanted him to answer in the form of a sworn affidavit and he would then need to seek legal advice before swearing the affidavit. Mr Norcross did email Mr Smith a list of questions on 29 January 2009 and Mr Smith proceeded to obtain legal advice from Kensington Swan concerning those questions.

[39] At the hearing, Mr Smith waved his claim to legal privilege and produced a copy of the email he had received from Mr Drake dated 29 January 2009 dealing with the meeting that had taken place the previous day and the list of questions from Mr Norcross. The second paragraph of Mr Drake’s email advice stated:

...

I share your concerns. It seems to me that the ‘real’ purpose of yesterday’s meeting was to coerce you into [providing] it with helpful evidence to its case/defence. If that is correct then the company is in serious trouble as the High Court will take a very dim view of that kind of behaviour (attempting to pervert the course of justice).

...

In reference to the list of questions from Mr Norcross, Mr Drake advised that he did not recommend providing a supplementary affidavit to the company. He said, “That might well negate the indemnity. But more importantly I do not think it wise to get further involved in this dispute.” Mr Drake concluded his advice as follows:

...

I’m not yet convinced that you should inform TTL (or not), answer Henry’s questions, or do anything for the time being. The reason Henry wants to keep this confidential is he is legally exposed (in terms of his response to the injunction and coercion). In my view, the questions have been prepared by a lawyer for the purpose to exculpate his client

I do think it worthwhile us writing to Mr Organ (the company’s employer adviser) and record that we are extremely unhappy with the approach which the company took at yesterday’s meeting. In fact we are quite insulted by the blatant manner in which they tried to place pressure on you to provide

evidence (a supplementary affidavit) and answer their questions. In our view this was very unfair to you and you would be entitled to consider their actions as a repudiation of the employment contract – ending the employment relationship.

...

[40] Mr Smith declined to answer the questions in an affidavit. He served out the balance of his time with Evolution on “garden leave” until 13 February 2009. Towards the end of February he was offered employment with TTL working with a client in the United Kingdom. He accepted the offer and commenced employment on 2 March 2009. His individual employment agreement was signed on 26 March 2009.

[41] Mr Smith said in evidence that the litigation between TTL and Evolution was settled out of court on 9 February 2009. He was not privy to the terms and conditions of the settlement apart from being aware that the settlement had resulted in TTL picking up all the previous joint-venture clients as well as the hardware and servers that had been used to process the joint-venture clients’ programs.

[42] The litigation between TTL and MarketSmart did not settle. MarketSmart was placed in voluntary liquidation in June 2009. Mr Norrie told the Court:

24. For the record, MS determined not to settle and the matter went on to a full hearing which resulted in the reserved judgment of Courtney J delivered on 21 May 2009 wherein all claims by TTL against MS were granted in full. It would be safe to infer that had the Plaintiff in this case not elected to settle with TTL, a similar (if not the same) orders would have been granted against the Plaintiff as both the Plaintiff and MS were in collusion in the illegal use of TTL’s proprietary Thor Transactor software.

[43] In cross-examination, Mr Norrie told the Court that Mr Harper, MarketSmart’s general manager, “admitted their actions in his subsequent affidavits” filed in the High Court litigation. Mr Norrie referred the Court to the costs judgment of Justice Courtney dated 23 December 2009⁵ which, as the witness put it “clearly set out the pact between the plaintiff (Evolution) and MS (MarketSmart).” Justice

⁵ *Transactor Technologies Ltd v MarketSmart International (NZ) Ltd* HC Auckland CIV-2008-404-008469, 23 December 2009.

Courtney ordered MarketSmart to pay costs to TTL on an indemnity basis. Her Honour set out the following paragraph from one of Mr Harper’s affidavits:⁶

62. MarketSmart accepts that it had a copy of the Thor system in its [possession] when it was endeavouring to assist Evolution to provide services to its clients. Evolution had advised MarketSmart that TTL had wrongfully terminated the joint venture agreement. In these circumstances, MarketSmart considered that its activities were covered by the software licence which was implicit in clause 14.3(b) of the joint-venture agreement.

[44] Further on in her judgment, Justice Courtney said:⁷

MarketSmart NZ had been caught “red handed” with confidential material in its possession, obtained through a breach of the joint venture agreement between Transactor [TTL] and Evolution...

I acknowledge the submission made by Mr Organ, advocate for the plaintiff, that Evolution was not a party to those proceedings and the reference to being caught “red handed” referred to MarketSmart.

Discussion

a) The pleadings

[45] Before turning to the merits, I need to address the pleadings. The claims made against the defendant are set out in the statement of claim in these terms:

The above named plaintiff claims that the defendant has committed a number of breaches against it, namely:

- (i) A breach of the duty of fidelity the defendant owed the plaintiff as his employer during the term of employment by providing an affidavit on his own volition to assist a third party in litigation with the plaintiff. The content of the affidavit contained information that the plaintiff contends was in part known by the defendant to have been incorrect; was in part incomplete and accordingly inaccurate and was in part confidential and the property of the plaintiff.
- (ii) A failure to comply with fair and reasonable instructions made by his employer resulting in harm to the plaintiff.
- (iii) A breach of the contractual terms between the parties relating to confidentiality, namely Schedule two of the Employment Agreement

⁶ At [50].

⁷ At [68].

between the parties entitled E://Volution E-Business Ltd Non Disclosure and Confidentiality Agreement.

- (iv) Performing work for Transactor Technologies Ltd, a party in litigation with the plaintiff, while still employed by the plaintiff in breach of clause 18 of the Employment Agreement between the parties.

[46] The relief sought by the plaintiff is:

- (a) A compliance order requiring the respondent to adhere to the terms of the Employment Agreement between the parties, in particular Schedule 2: Non Disclosure and Confidentiality Agreement.
- (b) That penalties be awarded against the respondent for each and every breach of the terms of the employment agreement between the parties pursuant to section 187 (b) of the Employment Relations Act 2000. The plaintiff seeks an order pursuant to section 136(2) of that Act that any penalty ordered by the Employment Court be paid to the plaintiff. The amount of the penalty sought for each breach is \$5000.
- (c) The recovery of compensatory damages in respect of the plaintiff's costs in defending the Interim Preservation Order which was supported by the defendant's affidavit containing information that was variously false, incomplete and confidential to the plaintiff. The plaintiff seeks an award of \$60,000.

...

[47] The hearing ran over the allocated time for the fixture and so the Court agreed to accept closing submissions in writing. In the first paragraph of his closing submissions dated 19 July 2011 Mr Organ said: "In total the defendant claims there have been no less than five breaches of the employment agreement..." and he then proceeded to identify, for the first time, specific alleged breaches of the employment agreement which had not previously been pleaded. In this regard, it was alleged that the defendant had committed breaches of cl 17.1; 23.0; para B page 2; 2.1; 4.1 (two breaches) and 4.4 (two breaches) of the employment agreement. The references to cl 17.1 and 23.0 of the employment agreement appeared as particulars under the alleged breach of the confidentiality agreement (see (iii) at [45] above) although the clauses in question are contained in the employment agreement itself and not in the confidentiality agreement which is a schedule to the agreement.

[48] Further lengthy submissions in reply were filed on 9 August 2011 and again Mr Organ proceeded to reformulate aspects of the plaintiff's claim against the defendant. The alleged breaches of cls 2.1, 4.1 and 4.4 of the employment

agreement, which had stood alone in his original submissions, were then altered to appear as particulars of the breach of the duty of fidelity (see (i) at [45] above) which had been amended from the statement of claim to read: “A breach of the duty of fidelity *and loyalty ...*” (emphasis added). Mr Organ repeated his claim for a penalty of \$5,000 “or more” in respect of each breach along with an order that the penalty recovered be paid to the plaintiff.

[49] The Court is concerned about the cavalier way in which the plaintiff has developed and reformulated its claim without any attempt to regularise the position by obtaining leave to amend the statement of claim. Admittedly, the defendant did not take any point over these late developments but he is unrepresented by legal counsel and in all likelihood is unaware of their potential significance. The plaintiff’s actions assume particular relevance in a case like the present where it seeks the imposition of a penalty in respect of each alleged breach of the employment agreement.

[50] In *Maritime Union of New Zealand v C3 Ltd*,⁸ Judge Travis had to deal with an application for leave to file an amended statement of claim. His Honour noted the flexibility the Employment Court has to determine matters in accordance with the substantive merits of the case. Judge Travis adopted with approval⁹ a passage from an uncontentious portion of the dissenting judgment of Justice Thomas in *Lowe Walker Paeroa Ltd v Bennett*¹⁰ which noted that:¹¹

Clearly, the jurisdiction of the Employment Court under [the equity and good conscience jurisdiction] is wide and far-reaching. The Court is not to be hamstrung by adherence to form. It is the substance and reality of the matters before it that are to count. The jurisdiction enables the Employment Court, consistently with the requirements of the Act and any collective employment contract, to achieve a just regulation of the mutual rights and duties of employers and employees.

[51] Regulation 11 of the Employment Court Regulations 2000 sets out the requirements in relation to statements of claim. Relevantly, reg 11(1)(c) provides that a statement of claim must specify any provisions of an employment agreement

⁸ [2010] NZEmpC 60.

⁹ At [17].

¹⁰ [1998] 2 ERNZ 558 (CA).

¹¹ At 582.

or employment contract that are relied upon. The rules are there for a purpose. It is axiomatic that defendants have the right to know what is alleged in the claim made against them. I recognise and agree with the approach referred to in the *Maritime Union* case but there are still certain basic formalities which must be adhered to if justice is to be done between the parties. A defendant cannot be ambushed by last minute changes to the plaintiff's claim made informally in submissions without the leave of the Court. I propose to approach the plaintiff's case, therefore, on the basis set out in its statement of claim. In other words, I disallow any new claims raised for the first time in the plaintiff's closing submissions but I will accept efforts made in the closing submissions to, in effect, provide particulars in relation to the claims as pleaded in the statement of claim.

b) *The merits*

[52] Two of the plaintiff's claims can be dealt with relatively briefly. I refer first to the allegation that the defendant performed work for TTL while he was still employed by Evolution.¹² It was pleaded in para 15 of the statement of claim that in January 2009 the defendant had been performing work for TTL while still employed by the plaintiff and had already made arrangements to enter into an employment agreement with TTL. It was alleged that his actions constituted a breach of cl 18.0 of his employment agreement. These allegations were put to Mr Smith in the course of his lengthy cross-examination and he denied them. The topic was also raised with Mr Macleod in relation to the P.P.S.S comment in his email dated 5 January 2009, "congratulations you are a winner good choice".¹³ Mr Macleod said in examination-in-chief, "I think really all I was saying to Ben, good choice, you know, get on with your life." The matter was followed up by Mr Organ in his cross-examination of Mr Macleod. The transcript records:

- Q.** And maybe you could answer that question please.
A. Well I know that there was no choice of him moving to TTL. I can tell you that absolutely without question.
- Q.** How?
A. Because I was working at TTL at the time and he had no job offer from John and he had had no communication from me about any job offer.

¹² See (iv) at [45] above.

¹³ At [28] above.

[53] I accept Mr Smith's evidence that he did not work for or have any job offer from TTL prior to his leaving Evolution. His evidence in this regard was convincingly confirmed by both Mr Macleod and Mr Norrie.

[54] The second claim pleaded against Mr Smith refers to, "A failure to comply with fair and reasonable instructions made by his employer resulting in harm to the plaintiff."¹⁴ No particulars of this allegation were provided until the plaintiff's submissions were filed. In his submissions dated 19 July 2011 Mr Organ appears to state that this allegation refers to Mr Smith's refusal to provide the affidavit requested by Mr Norcross at the meeting on 28 January 2009 and by email a day later.

[55] Mr Smith's evidence, supported by the email dated 29 January 2009 from his counsel, Mr Drake, was to the effect that his unwillingness to provide the further information requested by Mr Norcross was based on the legal advice he had received at the time. He proceeded to waive privilege and produced a copy of that written legal advice. Mr Smith told the Court that he had received no other written legal advice around that time. I accept Mr Smith's evidence in this regard.

[56] In relation to the claim based on Mr Smith's alleged failure to comply with a fair and reasonable instruction from Mr Norcross, I accept that employees have a duty to obey lawful and reasonable instructions from their employers. Although Mr Organ did not specifically mention the good faith obligation of employees and employers under s 4(1A)(b) of the Act to be responsive and communicative, I accept that Mr Smith also had this related duty.¹⁵ How these duties are satisfied in any given case will, of course, depend on the facts. In particular, this Court has long recognised that an employee has the right to silence when criminal investigations are about to begin or are ongoing or when charges have been laid.¹⁶ When Mr Smith declined to answer any further questions from his employer, he did so based upon professional legal advice that any further comment could place his indemnification from legal action by TTL in question (see [39] above). Relevantly, the High Court also has inherent contempt powers in relation to the enforcement of injunctions.

¹⁴ See (ii) at [45] above.

¹⁵ *Radius Residential Care Ltd v McLeay* [2010] NZEmpC 149 at [55].

¹⁶ *Russell v Wanganui City College* [1998] 3 ERNZ 1076.

While these matters are not criminal investigations or proceedings, there is no doubt that Mr Smith could reasonably believe, and did believe at the time, that he was in legal jeopardy and the most prudent course was for him to refrain from comment. In these circumstances, I am not prepared to find that Mr Smith breached his duty to obey reasonable instructions or his duty of good faith in declining to provide the affidavit evidence required by Mr Norcross.

[57] I turn now to the remaining two claims pleaded against Mr Smith as noted in (i) and (iii) at [45] above. They allege respectively that he breached his duty of fidelity to the defendant by making his affidavit of 22 January 2009 available to assist TTL in the litigation against Evolution and that he breached the terms of his Non Disclosure and Confidentiality Agreement by disclosing confidential information in the same affidavit. In relation to the affidavit, it is also alleged that it contained information that was “part known by the defendant to have been incorrect; was in part incomplete and accordingly inaccurate and was in part confidential and the property of the plaintiff.”

[58] I reject any suggestion that Mr Smith’s affidavit was incorrect, inaccurate or otherwise misleading. Evolution was no doubt unhappy with its contents but it was evidence given on oath and it is a serious allegation to suggest that Mr Smith was in any way trying to misrepresent the situation or mislead the Court. Mr Smith was, however, bound by a confidentiality agreement which precluded the publication or disclosure to a third party or the use, either for his benefit or the benefit of anyone else, of any of the company’s confidential information or trade secrets. Essentially, therefore, the remaining issue is whether Mr Smith breached his duty of fidelity or contract under the confidentiality agreement in making the affidavit in question available in the way that he did.

[59] Rather surprisingly perhaps, given the specific reference by Judge Travis in his interlocutory judgment of 16 February 2010 to the relevant authorities (see [2] above), Mr Organ made no reference in his submissions to the equitable defence that there is no confidence in the disclosure of an iniquity. It has long been recognised that the court will not restrain the disclosure of otherwise confidential information if such disclosure reveals illegal acts or other misconduct of such a nature that it ought

in the public interest to be disclosed to one who has a proper interest in receiving the information. Apart from the authorities referred to by Judge Travis, the principle was recently reaffirmed by the Court of Appeal in *R v X* (CA553/2009):¹⁷

[63] It has for many years now been an accepted principle in relation to the civil law of confidentiality that there may be just cause for the use or disclosure of the information. This principle can be traced back to the old equitable maximum that there is no confidence in an iniquity: *Gartside v Outram* (1856) 26 LJ Ch 113. It was subsequently broadened into its more modern formulation by (principally) Lord Denning in cases such as *Fraser v Evans* [1969] 1 QB 349 (CA). And in *Initial Services Ltd v Putterill* [1968] 1 QB 396 (CA) at p 405 Lord Denning said that this proposition:

... should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always – and this is essential – that the disclosure is justified in the public interest. The reason is because “no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare” [referring to authority].

[64] In *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43, this Court held at 46:

What has been called ever since *Gartside v Outram* ... the defence of iniquity is an instance, and probably the prime instance, of the principle that the law will not protect confidential information if the publication complained of is shown to be in the overriding public interest: see generally *Lion Laboratories Ltd v Evans* [1985] QB 526; *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 176-177, 178; *Attorney-General v Observer Ltd* [1990] 1 AC 109, pp 268-269, 287-283.

[65] The precise ambit of the public interest defence, as it is now sometimes called, has continued to be a matter of some controversy in our civil law....

[60] In my view, disclosure, in the form of a sworn affidavit of actions contravening a court injunction and therefore amounting to a contempt of court would clearly meet the public interest requirement referred to in the authorities and thus would come within the category of an exception to the obligation on an employee not to disclose confidential information. I am satisfied on the evidence that the information disclosed by Mr Smith in his affidavit revealed and was intended to reveal conduct that would be relevant to any consideration by the High Court of the allegation that the plaintiff had acted in breach of the injunction. That

¹⁷ [2009] NZCA 531, [2010] 2 NZLR 181.

was borne out, of course, by the swift action taken by the High Court in issuing the Anton Piller order on the same day that the application and supporting affidavits were filed.

[61] In answer to a question from the Court, Mr Smith described the type of work he had been carrying out which, in his opinion, amounted to a breach of the injunction. His evidence in this regard was challenged by the plaintiff. Mr Norcross said in his evidence in reply, “No specifics are provided by Ben in relation to precisely why he believes this to be the case.” However, Evolution’s senior technical person, Mr Fellows, gave evidence that even he did not have the knowledge of the Thor system that Mr Smith had. The analogy Mr Fellows used to compare their technical experience in relation to the Thor system was to explain how he (Mr Fellows) knew that a car required an engine and how the engine connected with the steering and other parts of the vehicle but he had no understanding of the workings of the engine. Whereas Mr Smith’s understanding of the Thor system and data-base was comparable to Mr Smith having intimate knowledge of the internal workings of a car engine. I accept Mr Smith’s assertion that he had been carrying out work in breach of the injunction.

[62] In any event, the disclosures made by the defendant in his affidavit are now historic and they were duly acted upon by the High Court. In these circumstances, I do not see it as the role of this Court to now investigate their substance. Although in a different context, the situation in this regard has similarities to a submission dealt with by Scott J *In re A Company’s Application*.¹⁸ In that case the defendant had been employed by the plaintiff company as its financial compliance officer. He claimed that he had been unfairly dismissed and there was a dispute over his entitlement to compensation. In a telephone conversation with the plaintiff’s chief executive officer, the defendant mentioned a certain amount of money and also referred to various alleged breaches by the plaintiff of financial regulations and tax irregularities. The plaintiff took the view that the defendant’s statements amounted to blackmail and that any disclosure of the allegations to the relevant financial regulatory authority or Inland Revenue would be based on confidential information belonging to the plaintiff. The plaintiff accordingly obtained an ex parte injunction

¹⁸ [1989] 1 Ch 477; [1989] 2 All ER 248 (EWHC).

and an Anton Piller order against the defendant. On the inter partes hearing of the plaintiff's application for a continuation of the injunction, the Court refused to continue its application to the regulatory authority or the Inland Revenue. It was held that the defendant's duty of confidence did not prevent him disclosing to the regulatory authority or the Inland Revenue matters which it was the province of those authorities to investigate because it would be contrary to the public interest if employees of such companies were inhibited in reporting possible breaches of the regulatory system or fiscal irregularities.

[63] In the course of argument, it was submitted on behalf of the plaintiff that it was for the court hearing the interlocutory application to conduct some sort of preliminary investigation into the substance of the allegations for the purpose of deciding whether there was a case warranting investigation by either the regulatory authority or Inland Revenue. Scott J held:¹⁹

Where the disclosure which is threatened is no more than disclosure to a recipient which has a duty to investigate matters within its remit, it is not, in my view, for the court to investigate the substance of the proposed disclosure unless there is ground for supposing that the disclosure goes outside the remit of the intended recipient of the information.

[64] An obvious distinction can be made between that case where the disclosure had not yet been made and the present where the disclosure is historic. It seems to me, however, that the principle stated has wide application and for the defence of iniquity to apply it is sufficient if the court charged with the task of determining the status of the duty of confidence is satisfied that publication of the confidential information is in the public interest and that the recipient of the information has a proper interest in receiving the information.

[65] I am also satisfied that some important answers which Mr Norcross provided to Justice Harrison during his oral examination on 22 December were incorrect and misleading. In this regard, the evidence before me, which I accept, was that in addition to MarketSmart, access to the Thor software and programs had also been provided by Evolution to an Asian based company, OMG. Mr Norcross was aware of that fact but it was not disclosed. I was not impressed with efforts made by the

¹⁹ At 482-483; 252.

plaintiff's witnesses to try to explain away Mr Norcross' failure to disclose this highly relevant information to the Judge. Access to the Thor system was still available to OMG after the injunction had been issued.

[66] Against that background, it is somewhat surprising that the plaintiff has chosen to pursue this unmeritorious litigation. In her costs judgment in the action between TTL and MarketSmart, Justice Courtney observed:²⁰

Perhaps the most striking aspect of MarketSmart NZ's response to [TTL's] proceedings has been its lack of recognition that it has done anything wrong.

I respectfully express the same sentiments in relation to Evolution's role in this whole sorry saga.

[67] On the issue of credibility, I found Mr Smith to be an entirely credible and reliable witness. I was also impressed with the evidence given by Mr Norrie. On the other hand, I found that the plaintiff's two principal representatives, Mr Johnson and Mr Norcross, were prone to exaggerate their case and make allegations which quite simply were not supported by the evidence. For example, Mr Johnson, the chairman of Evolution, claimed that, "both Ben Smith and Andrew Macleod were plants to help John Norrie take over our business". Mr Norcross made a similar allegation:

47. A short time after the termination of his employment with Evolution, we became aware that he (Mr Smith) had commenced working for TTL on 2 March 2009. Our belief is that this was more than a coincidence. Given the events that have transpired including his actions against Evolution, our strong belief is that he was colluding with TTL while employed by Evolution and that the employment with TTL had been arranged beforehand.

For the record, I reaffirm that I found no substance to these claims. The allegations did nothing to assist the credibility of the plaintiff's case.

[68] The defendant made a counterclaim alleging, in essence, that Evolution had acted in breach of the employment agreement in failing to comply with the terms of the injunction and in using him to facilitate those breaches. He claimed to be adversely affected by the stigma of his association with Evolution. Whilst there is

²⁰ At [50].

authority recognising such a claim based on an employer's breach of its obligations of trust and confidence,²¹ I am not satisfied that the elements necessary to support the counterclaim as pleaded have been made out in the present case. The defendant did not refer to the counterclaim in his otherwise impressive 132 paragraph closing submissions.

Conclusion

[69] The plaintiff fails in its claim. The defendant is not entitled to costs in respect of the hearing because he was not represented by legal counsel – see *Clifford Lamar Ltd v Gyenge*²² where the Court of Appeal reaffirmed that lay litigants are not entitled to costs. There was evidence, however, that Mr Smith had lawyers acting for him on a number of interlocutory matters. He is entitled to claim for legal costs reasonably incurred in relation to the case. He may also claim for disbursements. If agreement cannot be reached on an appropriate allowance for costs in this regard, then the defendant should file a memorandum within one month of the date of this judgment attaching receipted invoices together with an appropriate explanation of the services provided. The plaintiff will then have an additional one month period in which to respond.

A D Ford
Judge

Judgment signed at 2.30 pm on 26 August 2011

²¹ See *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (HL).

²² [2011] NZCA 208 at [12].