IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2021-404-1053
[2021] NZHC 1704

UNDER	Copyright Act 1994 Fair Trading Act 1986
IN THE MATTER OF	Breach of Confidence Inducing Breach of Contract Conspiracy Copyright Infringement Conversion Misleading and deceptive conduct
BETWEEN	GREEN WAY LIMITED Plaintiff
AND	MUTUAL CONSTRUCTION LIMITED First Defendant

Continued…

Hearing:	30 June 2021
Appearances:	C Elliott QC and J B Scheirlinck for the Plaintiff J G Miles QC and R L White for the Defendants
Judgment:	8 July 2021

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 8 July 2021 at 4:00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

PHILLIP ANTHONY AINSWORTH
Second Defendant

ZHEHUA (WILLIAM) XIANG
Third Defendant

STEFAN MASUTTI
Fourth Defendant

[1] On 16 June 2021, the plaintiff, Green Way Ltd, filed this proceeding. At the same time Green Way applied, without notice, for a search order and an interim injunction against the first defendant, and for an order that the second, third and fourth defendants file an affidavit disclosing any documents or information in their possession belonging or relating to Green Way.

[2] On 17 June 2021, on a without notice basis, Lang J made the three orders sought by Green Way. On 18 June 2021, the search order was executed.

[3] The defendants apply for all three orders to be rescinded. They say Green Way did not apply in the correct form, did not certify it had complied with its obligations on an application without notice, and failed to discharge its obligation to make full and frank disclosure to the Court of all material facts.

Green Way's substantive claim

[4] I will begin by outlining Green Way's substantive allegations against the defendants. The defendants dispute many of the allegations.

[5] Green Way is a civil engineering and construction company. It was formed in 2013. It has almost 100 employees, and a substantial annual turnover.

[6] Since 2015 Green Way has specialised in providing deconstruction services, including asbestos removal and demolition. Green Way is a market leader in New Zealand in the asbestos removal industry. It has spent considerable time and money in developing processes and systems, and in hiring employees, that have allowed it to attain this leading position.

[7] Green Way has obtained four certifications for asbestos removal from Telarc, an auditing and assessment company. Green Way is the only asbestos removal company in New Zealand that holds all four certifications. This provides it with a significant competitive edge in a highly specialised technical market.

[8] The first defendant, Mutual Construction Ltd (MCL), is a building and construction company. Green Way says that from about March 2021 MCL has been

setting up a new branch of business, closely modelled on Green Way, specialising in asbestos removal and demolition.

[9] The second, third and fourth defendants are former employees of Green Way. Mr Ainsworth was employed as Operations Manager. Mr Xiang was a Contracts Manager. Mr Masutti was employed as Health and Safety and Quality and Environmental Compliance Manager. The former employees each resigned from Green Way on various dates in May 2021.

[10] Green Way alleges that the former employees have obtained and misused Green Way's confidential information, and that MCL has participated in and benefited from that misuse. The confidential information is said to include Green Way's Master Pricing Spreadsheet (which Green Way has honed over several years to allow it to accurately price potential projects), its Management System Manual 2021, its Procedures Manual, and its Asbestos Removal Standards Procedures Manual. Green Way says the manuals are central to Green Way meeting the standards required to obtain and maintain its certifications.

[11] These documents and other confidential information were securely stored on Green Way's SharePoint server. Green Way says that, in breach of company policy, in the months leading up to their resignations the former employees emailed the documents and other confidential information to their personal email addresses.

[12] Green Way alleges that, while still employed by Green Way, Mr Ainsworth and Mr Masutti actively worked with MCL to assist MCL to obtain certification for asbestos removal and demolition. While still employed by Green Way, Mr Masutti received at least two "Employee Payslips" from MCL. The three former employees are now employed by MCL.

[13] Green Way says that Mr Xiang has, beginning in around November 2020, siphoned Green Way's asbestos removal work to MCL. MCL has used Green Way's name when completing asbestos removal work, and has masqueraded itself as though it is authorised by Green Way to do such work.

[14] MCL is going through the process of obtaining the certifications necessary for asbestos removal and demolition. Green Way alleges this would only be possible if MCL had the necessary systems, processes and documentation in place.

[15] When it began this proceeding, Green Way expressly pleaded it was still conducting inquiries and investigations into the defendants' actions.

[16] Based on the above allegations, Green Way pleads causes of action for breach of confidence, conspiracy by unlawful means, breach of copyright, conversion, inducing breach of contract, and misleading or deceptive conduct in breach of s 9 of the Fair Trading Act 1986.

Green Way's without notice application

[17] On 16 June 2021, Green Way applied, without notice, for three orders:

(a) A search order against MCL.

(b) An interim injunction against MCL, restraining it from "possessing, using, disclosing, disseminating, copying or destroying any Confidential Information referred to in paragraphs [12] and [13]" of Green Way's statement of claim.

(c) An order against the former employees, requiring them within 48 hours to file an affidavit identifying and disclosing any documents or information that "belongs to or relates to Green Way" that are in their personal possession, "including any Confidential Information referred to in paragraphs [12] and [13]" of Green Way's statement of claim.

[18] The application was supported by two affidavits, and accompanied by a memorandum of counsel and by various undertakings.

Orders made

[19] Lang J determined the application on 17 June 2021. His Honour said that, having read the material filed in support, he was satisfied it was appropriate to make

the orders sought, subject to some minor amendments to their terms. He directed the proceeding to have its first call in the Duty Judge list on 24 June 2021.

[20] The search order required MCL to permit an independent solicitor (appointed to supervise the execution of the order) and the plaintiff's IT technicians to enter MCL's premises to obtain computers, laptops, smart phones and associated electronic equipment. It also required the company to give to those persons effective access, with necessary passwords and passcodes, to the information in those devices. The order restrained MCL from using or disclosing to anyone, other than their legal advisors, specific information listed in the order.

[21] The search order was executed on 18 June 2021. The supervising lawyer provided a report to the Court on 23 June 2021.

[22] A sealed copy of the other two orders (the interim injunction against MCL and the order requiring the former employees to file an affidavit disclosing documents or information that belonged to or related to Green Way) was served on the defendants on 22 June 2021.

The defendants object

[23] On 23 June 2021, the defendants filed a memorandum raising objections to the procedure adopted by Green Way. The defendants said Green Way had failed, when applying without notice, to comply with its obligation to make full disclosure to the Court. The defendants also took issue with the terms of the orders.

[24] Mr Elliott QC, for Green Way, filed a detailed memorandum in response. He also sought various directions.

[25] The proceeding came before Nation J, as Duty Judge, on 24 June 2021. Counsel accepted that the issues raised in their memoranda required a hearing. Nation J allocated an urgent hearing for 30 June 2021, and directed further submissions be filed by 25 June 2021.

[26] In advance of the hearing the parties filed a surprising volume of further affidavit evidence. Large parts of that evidence addressed substantive matters that I was never going to determine in an interlocutory hearing.

[27] Mr Elliott filed further submissions on 25 June 2021, as directed. Mr Miles QC was engaged by the defendants only on that day. He filed his submissions on 29 June 2021. Mr Elliott very reasonably (and sensibly) took no objection.

The competing positions

[28] The defendants say the without notice orders should not have been sought, or granted. The defendants say that Green Way's application was in the incorrect form, and that it did not include the certificate required for any application made without notice. Independently of those alleged formal failures, the defendants allege Green Way failed to make full and frank disclosure to the Court of all material facts.

[29] The defendants say that Green Way's failings in making the application were egregious, such that it is appropriate to rescind the orders.[1]

[30] Green Way firmly resists the allegations of material non-disclosure, and the call for the orders to be rescinded. It proposes a protocol for categorising and sorting the yield obtained from the search order.

The issues

[31] The following issues arise:

(a) Did Green Way fail to comply with its obligations when making the application without notice?

(b) If there was such non-compliance, should any of the orders be rescinded?

---

[1] The defendants did not make a formal application for rescission. Mr Elliott did not raise any concern at the lack of a formal application. I had none.

(c) If the search order is to remain, should I make directions in accordance with the protocol proposed by Green Way?

[32] I begin with the legal framework.

The law governing applications without notice

[33] An order made without notice is draconian, because it is issued in the absence of the party who is to suffer its consequences. The absent party is denied the fundamental right of natural justice to be heard in its own defence. [2]

[34] Two consequences follow. First, an application without notice can be made only in exceptional circumstances, such as where proceeding on notice would cause undue delay or irreparable injury to the applicant. Secondly, the applicant must make full and frank disclosure of all material facts, whether those facts assist the applicant's case or not.[3] Material facts are those that are material for the court to know "in dealing with the application as made".[4] They therefore include not only facts that are material to possible defences to the substantive claim, but also facts that are material to possible grounds of opposition to the application.

[35] These matters are codified in r 7.23(2). Rule 7.23(2)(a) provides that an application without notice can be made only on specified grounds, the first being "that requiring the applicant to proceed on notice would cause undue delay or prejudice to the applicant". Rule 7.23(2)(b) provides that such an application can be made only if the applicant has made all reasonable enquiries and taken all reasonable steps to ensure the application, and supporting documents, contain all material "that is relevant to the application", including any defence that the other party might rely on and "any facts that would support the position" of the other party.

[36] The obligation in r 7.32(2)(b) is not merely to take all reasonable steps to disclose material facts. The applicant must also (and, logically, first) make

---

2 *Wadsworth Norton Solicitors Nominee Co Ltd v Bruns* (1992) 5 PRNZ 481 (HC) at 482; *McPherson v Bergers Securities Ltd* HC Auckland CIV-2003-404-2752, 12 June 2003 at [1].

3 *McPherson v Bergers Securities Ltd* HC Auckland CIV-2003-404-2752, 12 June 2003 at [2] and [3].

4 *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 (CA) at 1356.

"reasonable enquiries" to ensure that all relevant material is disclosed. In *Brink's Mat Ltd v Elcombe*, Ralph Gibson LJ explained that:[5]

> The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

[37] The extent of the enquiries that the applicant must make will depend on the circumstances, including the nature of the order or orders sought.[6] Where, as here, the applicant seeks a search order, the obligation to make proper enquiries (and the obligation of full and frank disclosure generally) is enhanced. This is because a search order interferes so seriously with a defendant's rights.[7]

[38] The limited grounds on which an application without notice can be made, and the applicant's duty of full and frank disclosure, are reinforced by other subclauses of r 7.23. The first is found in r 7.23(1), which provides that the applicant must use Form G32. Form G32 requires the applicant to identify the grounds on which the application is made without notice, and requires the person signing the application to certify that:

(a) Those grounds are made out.

(b) All reasonable enquires and all reasonable steps have been made or taken to ensure that the application contains all relevant information, including any opposition or defence that might be relied on by any other party, or any facts that would support the position of any other party.

[39] The requirement to use Form G32, including the need to certify, is not a mere technicality.[8] It serves the important purpose of bringing home to the person who signs the application the limited basis on which an application without notice can be made, and the requirement for full and frank disclosure of possible grounds of opposition and possible defences.

---

5 *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 (CA) at 1356.
6 *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 (CA) at 1356.
7 *Anvil Jewellery Ltd v Riva Ridge Holdings Limited* [1987] 1 NZLR 35 at 44 (HC); John Katz *Search Orders* (LexisNexis, Wellington, 2011) at [7.1.1].
8 *Wadsworth Norton Solicitors Nominee Co Ltd v Bruns* (1992) 5 PRNZ 481 (HC) at 482.

[40] The second reinforcement is found in r 7.23(3). This requires the applicant to file a memorandum whenever the application is of a kind that would likely be contested if made on notice (which Green Way's application clearly was). The memorandum must (among other things) explain the grounds on which each order is sought without notice and set out all information known to the applicant that is relevant to the application. It is not sufficient for the memorandum to disclose possible defences: the information must include "any known grounds of opposition or defence" on which the other party may rely, or any facts that would support the other party's "opposition to the application or defence of the proceeding".

[41] The memorandum is central to the without notice procedure, particularly where a large volume of material is put before the court in support of the application. Mr Miles referred me to the following observation of John Katz QC (in relation to applications without notice for search orders), which I endorse:[9]

> [W]here the disclosure is indeed voluminous, it becomes important to ensure that the court is directed towards what are important and relevant documents or issues and not to assume that the disclosure obligation is satisfied simply because the relevant material is buried somewhere in the documents. It is not for the judge to have to sift through and locate for himself or herself relevant material. This is particularly so where the material is or might be favourable to the defendant.

[42] Mr Miles also referred me to the judgment of Popplewell J in an English case concerned with an application without notice for a freezing order, *Fundo Soberano de Angola v Dos Santo*. Popplewell J said:[10]

> [52] … In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.

---

9 John Katz *Search Orders* (LexisNexis, Wellington, 2011) at [7.1.1]. Mr Katz's observations were made before the present r 7.23 codified this obligation.

10 *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 (Comm).

[43] Popplewell J referred to the need for signposting, and a full and fair summary, in "the main affidavit and skeleton argument". But that of course was said without reference to r 7.23, which requires *the memorandum* to set out all information relevant to the application, including known grounds of opposition or defence, or any facts that would support opposition or defence.

[44] Lastly, r 7.23 reinforces the obligation of full and frank disclosure by setting out, in subclause (4), the consequences of the applicant failing to disclose all relevant matters to the court, or failing to file a memorandum complying with subclause (3). Such failures may result in the court dismissing the application or (if orders have been made) rescinding the orders. I will address this below.

[45] Rule 7.23 applies to all applications without notice. There is also a particular provision, r 33.5(4), which applies to applications without notice for search orders. Rule 33.5(4) provides that the applicant "must fully and frankly disclose to the court all material facts, including … any possible defences known to the applicant". Rule 33.5(4) predates, and is probably otiose in light of, the current form of r 7.23(1)-(4).[11] In any event, it is not sufficient for an applicant for a search order without notice to comply merely with r 33.5(4). There must also be compliance with r 7.23.

Did Green Way fail to comply with its obligations when making the application without notice?

Did Green Way fail to use Form G32 or provide the required certificate?

[46] The defendants say that Green Way failed, in breach of r 7.23(1), to make its application in Form G32. One consequence was that Green Way did not certify the matters required by that form.

[47] It is plain on the face of Green Way's application that it failed to comply with r 7.23(1):

---

[11] The current form of r 7.23(1)-(4) was introduced by the High Court Rules 2016 Amendment Rules (No 2) 2017, as from 1 September 2017.

(a) The application did not identify the grounds on which the application was made without notice.

(b) The person signing the application (Green Way's solicitor) did not certify that the grounds were made out, or that Green Way had made full and frank disclosure.

[48] Green Way did not submit otherwise. Indeed, Green Way's submissions, like its application, made no reference to r 7.23. Green Way's application and submissions referred to Part 33, in particular r 33.5, as if that alone governed the duty of full and frank disclosure. This may explain, but of course does not excuse, what is a glaring non-compliance.

[49] Green Way's memorandum in support of its application did identify grounds on which the search order was sought without notice (though it did not certify compliance, and it did not explain the basis on which the other two orders were sought without notice). That does not excuse Green Way's non-compliance with r 7.23(1), but is relevant to whether the search order should be rescinded. I return to that below.

Did Green Way fail to make full and frank disclosure?

[50] The defendants say that, quite apart from the formal non-compliance that I have just addressed, Green Way failed to comply with its obligation of full and frank disclosure of all material facts. The defendants allege that there was insufficient disclosure of two matters.

[51] The defendants' first allegation is that Green Way failed to disclose that MCL is a well-established and reputable construction business. Instead, the defendants say, Green Way described MCL as a new entity specifically set up to house or to channel the confidential information allegedly received from the former employees.

[52] The second allegation is that there was insufficient disclosure of correspondence between the former employees and Green Way, of the former employees having engaged solicitors, and of possible grounds of opposition that arose from those matters.

[53] To place the defendants' allegations in context, I first identify the material that was before the Court when Green Way made its application without notice. This was:

(a) An application for interim injunction and search orders, together with draft orders.

(b) A 14-page memorandum in support of the application.

(c) A statement of claim of 27 pages.

(d) The main affidavit in support by one of Green Way's directors, Sebastian Jonsson. The body of Mr Jonsson's affidavit was 35 pages. Annexed to his affidavit were two bundles of documents totalling 434 pages.

(e) A further confidential affidavit in support by Mr Jonsson. This was one page, with 22 pages of exhibits.

(f) An affidavit in support by Green Way's IT consultant, George Douglas, of eight pages.

(g) Several undertakings.

[54] The High Court is presented with applications without notice that contain larger quantities of material than this. Nonetheless, the amount of material in Green Way's application is accurately described as voluminous.[12] Green Way presented the application as being urgent, as search orders generally are. This was therefore a case where the judge was likely to be under time constraints, and it was essential that the memorandum in support identify relevant material and possible grounds of opposition or defence.

[55] With that context in mind, I turn to the defendants' particular allegations.

---

[12] This is not a criticism. It is merely to place Green Way's disclosure obligation in context.

Did Green Way fail to disclose that MCL is a well-established and reputable construction business?

[56] Mr Miles said that Green Way inaccurately described MCL as a new entity specifically set up to house or to channel the confidential information received from the former employees. Mr Miles submitted that a factor that would encourage a judge to grant a search order would be a concern that MCL was a "fly-by-night" company that could not be trusted to comply with legal obligations such as respecting duties of confidence. In fact, MCL has been established for several years and is a reputable construction business.

[57] I accept there are parts of Green Way's memorandum that suggest MCL is a new entity set up specifically to take on Green Way by misusing its confidential information. But the tolerably clear impression, reading the memorandum as a whole, is that Green Way is alleging that MCL is a company with an existing business that is setting up a new asbestos removal branch. This is how MCL is characterised when the memorandum first addresses MCL's role at paragraphs [16]-[19]. This is also how MCL is described in the statement of claim.

[58] I therefore reject this allegation.

Did Green Way fail to disclose correspondence between the former employees and Green Way, that the former employees had engaged solicitors, and possible grounds of opposition that arose from those matters?

[59] On 21 May 2021, Green Way sent separate letters to each of the former employees, expressing its concern that the employees had supplied documents and confidential information to MCL. Green Way asked each employee to a meeting. Green Way did not ask the employees to preserve any documents. The following exchanges then occurred:

(a) On 26 May 2021, each of the former employees responded in writing to Green Way. The employees declined to attend a meeting with Green Way, but each confirmed that:

(i) He had taken legal advice.

(ii) He would preserve the integrity of Green Way's intellectual property.

(iii) He would not use or misuse any of Green Way's confidential information.

(iv) He did not have any commercially sensitive information belonging to Green Way in his possession or control.

(v) He had destroyed any of Green Way's confidential information that had been in his possession, including deleting soft copies.

(b) On 10 June 2021, Green Way's solicitors, Haigh Lyon, sent separate letters to each of the former employees. Haigh Lyon repeated Green Way's concerns, and required that each employee:

(i) Undertake not to use Green Way's confidential information.

(ii) Cease using any of Green Way's property or materials.

(iii) Immediately return any of Green Way's property or materials.

(iv) Undertake to comply with all legal obligations they were bound by as former employees of Green Way, including in respect of confidential information.

(c) On 14 June 2021, the former employees' solicitors, Langton Hudson Butcher, sent letters to Haigh Lyon. In response to Haigh Lyon's requests, Langton Hudson Butcher repeated the confirmations the former employees had given in their responses dated 26 May 2021.

[60] The defendants say Green Way did not fully and frankly disclose this exchange to the Court. Green Way responds that it informed the Court that relevant correspondence had been entered into and directed the Court to the specific correspondence in the bundle attached to Mr Jonsson's affidavit.

[61] Green Way's response is only partly correct, and misses the point. Its memorandum in support devoted more than three pages to outlining the defendants' "potential defences". Within those pages appeared this paragraph:

> Correspondence has been entered into with the three Former Employees. It is annexed to Mr Jonsson's affidavit.

[62] A footnote to that paragraph referenced the last six pages of the bundle attached to Mr Jonsson's affidavit. Those pages contained the letters from Langton Hudson Butcher, dated 14 June 2021, on behalf of the three former employees.

[63] The footnote did not reference any of the other correspondence I have set out above (indeed, the correspondence at (a)-(c) of [59] was almost entirely omitted from the material Green Way put before the Court). Nor did it provide a reference to the body of Mr Jonsson's affidavit in which he described the correspondence with the former employees.

[64] The memorandum therefore did not set out (as r 7.23(3) requires) the following information that was known to Green Way and which was relevant to the application:

(a) That the former employees had taken legal advice by 26 May 2021, and that a firm of solicitors was acting for them.

(b) That the former employees had, as early as 26 May 2021, and subsequently through their solicitors, confirmed that they would not use or misuse any of Green Way's confidential information, that they did not have any of Green Way's confidential information, and that they had destroyed any of Green Way's confidential information.

[65] This information was plainly relevant to Green Way's application for an order requiring the former employees to make an affidavit disclosing any documents or information in their possession belonging or relating to Green Way. First, it indicated a possible ground of opposition to that order. Secondly, on an application without

notice the Court should be informed if the defendant is represented by solicitors, as that will be relevant to the Court's decision whether to make orders without notice.[13]

[66] For two reasons the information was also relevant to the application for a search order and interim injunction against MCL. First, given Green Way was alleging all defendants were acting in concert, it was likely that, if the former employees had engaged solicitors and taken advice, so had MCL. The Court should have been informed of that. The Court could not deduce that from the information in the memorandum.

[67] Secondly, the correspondence between Green Way and the former employees showed that Green Way had suspected, as early as 21 May 2021, that MCL had received and misused confidential information. The correspondence therefore revealed the extent of the delay (from 21 May 2021 until 16 June 2021) before Green Way made its application, during which time it did not engage directly with MCL. That delay would have been relevant to the Court's assessment of (i) whether there was such urgency that it was appropriate to apply without notice and (ii) whether there was a real possibility MCL might destroy evidence.[14] Mr Elliott took me to evidence in Mr Jonsson's affidavit that he said explained the delay. But the point is that there should have been disclosure of this possible ground of opposition. It is no answer to such non-disclosure to say that the applicant had a response to the ground of opposition.

[68] Thus far I have been considering the extent to which the memorandum failed to include material information. In itself that was non-compliance. I will now address the extent to which Mr Jonsson's affidavit disclosed the correspondence with the former employees.

[69] Mr Jonsson referred to that correspondence in two passages (though the memorandum in support did not reference either passage).[15] First, at [109] of his

---

13 *McPherson v Bergers Securities Ltd* HC Auckland CIV-2003-404-2752, 12 June 2003 at [24]. See also *Nguy v Lawyers and Conveyancers Disciplinary Tribunal* [2021] NZHC 478 at [14].

14 A requirement of a search order: r 33.3.

15 The memorandum merely provided a direct reference to the letters from Langton Hudson Butcher dated 14 June 2021.

affidavit, Mr Jonsson said that the employees all responded to Green Way's 21 May 2021 request for a meeting. He annexed what he said were their responses. However, of the responses dated 26 May 2021, he annexed only Mr Masutti's response (not the responses of Mr Ainsworth or Mr Xiang), and he did not explain that Mr Masutti confirmed that he would not use or misuse Green Way's confidential information.

[70] Secondly, at [206]-[209] of his affidavit, Mr Jonsson described the exchange between Haigh Lyon and Langton Hudson Butcher of 10 and 14 June 2021. He did not annex Haigh Lyon's letters, though he fairly described the undertakings that Haigh Lyon required. He said the former employees responded through Langton Hudson Butcher, and annexed those letters. His only comment on the letters was:

> The Former Employees did not provide undertakings to sufficiently satisfy Green Way.

[71] These passages disclosed that by 14 June 2021 (though not earlier) the former employees had engaged solicitors. They did not disclose all the correspondence on 26 May 2021. They did not fully and frankly disclose that the former employees had given various confirmations to MCL.

[72] Given that limited disclosure, and that the memorandum did not reference either passage, I conclude Green Way failed to fully and frankly disclose the correspondence with the former employees or that the former employees had engaged solicitors and the possible grounds of opposition that arose from those matters.

Given the non-compliance, should any of the orders be rescinded?

[73] Given my conclusion that Green Way failed to comply with its obligations when applying without notice, I now turn to consider whether I should rescind any of the orders that have been made.

[74] The defendants submitted I should rescind all three orders, subject to a condition. Recognising that the search order has already been executed, the defendants proposed that I should order the independent solicitor and IT expert to return all documents and data to the defendants, on the basis that the independent

solicitor and IT expert retain copies of the documents but have no further dealings with them until further order of the Court.

[75] Mr Elliott submitted that I should not rescind the orders, even if I found non-compliance by Green Way. He submitted the evidence of wrongdoing by the defendants was strong, and justified the orders. He said the Court of Appeal in *Norris v Gemmell* held it is only in "exceptional circumstances" that court intervention is warranted once a search order has been executed.[16]

[76] I accept that in *Norris v Gemmell* the Court of Appeal indicated a search order, once executed, should be rescinded only in exceptional circumstances. But the Court immediately added:[17]

> The position in New Zealand was concisely stated by Henry J in *D B Baverstock Ltd v Haycock*:[18]
>
> > In my view the principle to be applied in respect of an application to discharge an executed Anton Piller order is that it should only be entertained prior to trial if the order has been obtained mala fide, or on material non-disclosure, or if there are other special circumstances which clearly demonstrate the need for immediate relief.

[77] Material non-disclosure is therefore one of the exceptional circumstances in which a court can entertain an application to rescind an executed search order. This does not mean that a finding of material non-disclosure will automatically lead to rescission. The court has a discretion, notwithstanding material non-disclosure, to continue the order or to make a new order on terms. In *Brink's Mat*, Ralph Gibson LJ described the plaintiff who had failed to disclose material facts as being "in mercy before the court".[19] Ralph Gibson LJ suggested the discretion might be exercised if the non-disclosure were innocent (in the sense that the facts were not known to the applicant or their relevance was not perceived) and if an order could properly be granted had the facts been disclosed.[20]

---

16 *Norris v Gemmell* [2014] NZCA 490 at [10].
17 *Norris v Gemmell* [2014] NZCA 490 at [10].
18 *D B Baverstock Ltd v Haycock* [1986] 1 NZLR 342 (HC) at 345.
19 *Brink's Mat Ltd v Elscombe* [1988] 1 WLR 1350 (CA) at 1357.
20 *Brink's Mat Ltd v Elscombe* [1988] 1 WLR 1350 (CA) at 1357.

[78] If Green Way's non-compliance had merely been as to the form of the application, and the lack of a certificate, I would not have rescinded the search order. This is not to downplay the seriousness of that non-compliance. Here the failure was stark. The formal requirements are important, not mere technicalities. It is simply to recognise that this non-compliance must have been obvious to Lang J, who nonetheless decided to grant the search order. I expect that was because the memorandum remedied the formal non-compliance in respect of the search order, by making clear the ground on which Green Way was applying without notice for that order, and by providing implicit certification that that ground was made out and that full and frank disclosure had been made.

[79] The memorandum did not remedy the formal non-compliance in respect of the interim injunction and the order that the former employees make affidavits. The memorandum only addressed the search order. It did not explain the basis on which the other orders were sought, let alone the grounds on which those orders were sought without notice.

[80] In any event, Green Way's non-compliance was also substantive. This puts its formal non-compliance in a different light. Moreover:

(a) Green Way's non-compliance was not innocent in the sense described by Ralph Gibson LJ. Green Way knew the facts, and it was not suggested to me that Green Way failed to perceive their relevance. Rather, Green Way's response to the allegation of non-disclosure was to insist there had been full disclosure.

(b) It is likely that, had the full facts been disclosed, the orders would not have been made. The facts told against the urgency needed for a search order, and against the risk of MLC destroying evidence. They told against the need for an interim injunction or for urgent affidavits from the former employees.

[81] For these reasons, I am of the clear view that all three orders should be rescinded, on the terms proposed by the defendants.

[82] To be clear, I find only that Green Way's non-disclosure was not innocent in the sense described. The defendants submitted Green Way had acted in bad faith, that the non-disclosure was deliberate, and that the memorandum in support was intentionally misleading. I am not satisfied of any of those things.

Result

[83] I rescind the orders granted by Lang J on 17 June 2021.

[84] I order the independent solicitor Mr Speir and the IT expert Mr McKenzie to return all documents and data obtained in execution of the search order to the defendants, on the basis that Messrs Speir and McKenzie will retain copies of the documents and data but have no further dealings with them until further order of the Court.

[85] The defendants are entitled to costs. If costs cannot be agreed, memoranda may be exchanged: the defendants by 23 July 2021, Green Way by 30 July 2021. Each memorandum is not to exceed three pages, excluding relevant annexures or schedules of costs.

_____

Campbell J