

Employment-related injunctions: where to file?

By Jennifer Mills, partner, and Aaron Lloyd, senior associate, Minter Ellison Rudd Watts

The Employment Relations Authority (Authority), and before it, the Employment Tribunal, have historically granted injunctive relief to parties for a wide range of breaches, and potential breaches, of employment agreements. However, that practice has now all but stopped. Last year's High Court decision in *BDM Grange Ltd v Parker* [2006] 1 NZLR 353, and the recent Employment Court decision in *Axiom Rolle PRP Valuations Services Ltd v Kapadia* (4 August 2006, Employment Court, Auckland AC43/06, Chief Judge Colgan, Judges Travis and Shaw), go a significant way to clarifying the position on injunctions in the employment arena.

The decisions do not provide all the answers, though. In this article, we will examine the change in approach to injunctive relief in the employment jurisdiction, and try to answer the question of where practitioners should file claims for injunctive relief arising in the context of an employment relationship.

BDM Grange – the High Court decision

The facts of *BDM Grange* are well known. The defendant was the former managing director of the plaintiff, and was operating in competition to the plaintiff in his new role as general manager of a competing business. The plaintiff alleged he had acted in breach of his fiduciary duties as a director of the plaintiff, in breach of common law obligations of confidentiality, and in breach of his statutory and contractual obligations as an employee. The plaintiff filed a claim in the High Court in relation to these alleged breaches, and obtained an *Anton Piller* order from that Court enabling it to seize certain evidence.

The defendants in *BDM Grange* challenged the right of the plaintiff to take High Court action. They relied upon s 161 of the *Employment Relations Act 2000* to argue the matter fell within the exclusive jurisdiction of the Authority, and that the High Court claims should be struck out. They also argued the High Court acted in error when it granted the *Anton Piller* order, and that this too should have been dealt with by the Authority in an attempt to nullify the evidence recovered as being obtained *ultra vires*.

The defendants failed to persuade the Court. In finding for the plaintiff, the full Court, Justices Baragwanath and Courtney, found where obligations arose independent of an existing employment agreement, such as directors' duties or common law confidentiality obligations, then the High Court could have jurisdiction. Accordingly, the claims and the *Anton Piller* order remained. Furthermore, the Court observed the Authority did not have jurisdiction to grant *Anton Piller* orders, and, somewhat controversially, cast doubt as to whether the Authority and the Employment Court had jurisdiction to grant injunctive relief at all, outside the limited circumstances specifically provided for in the *Employment Relations Act 2000*.

Axiom Rolle – the Employment Court decision

The High Court's decision was largely followed by the Employment Court in last month's decision in *Axiom Rolle*. Helpfully, the matter of injunctions generally, which was in many ways left in suspense by the comments of the High Court in *BDM Grange*, has been clarified. In *Axiom Rolle*, a full bench of the Employment Court (Chief Judge Colgan, and Judges Travis and Shaw) found the Authority does not possess the power to grant *Anton Piller* orders, consistent with the observation by the High Court in *BDM Grange*. The Court also found the Authority does not have the ability to grant injunctive relief *per se*. However, the Court departed from the *obiter dicta* of the High Court, finding the Employment Court does have

the power to grant injunctive relief, with this power arising from the Court's recourse, via the *Employment Relations Regulations*, to the injunctive powers of the High Court contained in the *High Court Rules 1985*. As they stand, the *High Court Rules* do not cover *Anton Piller* orders; they arise out of the High Court's inherent jurisdiction only.

Accordingly, the Employment Court concluded, consistent with the High Court's observation in *BDM Grange*, that although it could grant injunctive relief generally, it could not make *Anton Piller* orders.

A question of jurisdiction

Thankfully, the decisions in *BDM Grange* and *Axiom Rolle* are complementary in many respects. 'Thankfully' because it is not clear how the High Court and the Employment Court interrelate, and how conflicts in their rulings should be governed. The two courts have often been considered equals. This convention seems to rely upon the exclusive jurisdiction of the Employment Court and the level of judicial immunity granted to its Judges. However, no constitutional legislation, including the *Judicature Act 1908*, clarifies this convention. This state of affairs is less than desirable, and the present context highlights precisely why.

On the face of these two decisions, it is reasonably clear where counsel should file claims requiring injunctive relief in employment cases. The Authority is no longer an option. The Employment Court remains a legitimate forum for injunctive relief to prevent or repair a breach of an employment agreement, so long as the relief sought is not an *Anton Piller* order. The High Court is now the only avenue where such an order can be sought; and while you are there, you are entitled to seek injunctive relief with respect to any employment-related obligations, such as fiduciary duties or common law duties of confidentiality, where such obligations arise independently of the employment agreement itself. However, this clear picture remains somewhat muddled in practice.

First, the lack of clear authority on precedence as between the Employment Court and the High Court means reliance on the Employment Court's observations in *Axiom Rolle* may be risky. If counsel were to file for general injunctive relief in the Employment Court only, then it would be open to opposing counsel to challenge that decision, and implicitly the Court's findings in *Axiom Rolle*, in the High Court. A more prudent course of action, therefore, might be to seek all injunctive relief in the High Court. However, if it can be argued that such relief arises out of a dispute founded on an employment agreement, then challenge to that course of action might be raised in reliance on the Employment Court's exclusive jurisdiction. Arguably, the only course open at present, therefore, is to file in both jurisdictions, and to seek a stay, preferably by consent, of one proceeding.

The second reason the position remains muddled is the way in which the





Authority appears to have responded to this dialogue. It isn't clear that the Authority is willing to step out of the picture quite as easily as the Employment Court and the High Court seem to think is appropriate. The Authority, as recently as April 2006 in the case of *Donselaar v the Attorney General* (6 April 2006, Employment Relations Authority, Wellington WA52/06, WEA387/05, Member Wood), was considering the grant of injunctive relief. In respect of *Anton Piller* orders, whilst the Authority has not made an order as such, it has been willing to exercise its subpoena power, *ex parte*, to compel the production of material including computers (as in the August decision in *Multiserve Education Trust Ltd v Ross & Ors* (23 August 2006, Employment Relations Authority, Auckland AA271/06, Member Oldfield)). There are also instances where the Authority's power to make compliance orders is exercised in a manner akin to the grant of an injunction.

Against these concerns, however, have been some very public statements from the Authority that the landscape has now changed. At a recent ADLS seminar on *Burning Issues in Employment Law*, Authority Member Leon Robinson spoke, noting the Authority could no longer be relied upon by practitioners as a 'one-stop-shop', and that injunctions would no longer be granted by the Authority. In light of these comments, and the relatively short period of time that has elapsed since the *Axiom Rolle* decision, it is perhaps now less likely the Authority will be willing to grant this sort of relief going forward.

So where to from here?

It seems clear that in the interim, at least, counsel should file injunction claims in both the Employment Court and the High Court where that is possible. If the Employment Court's decision in *Axiom Rolle* is challenged in the High Court, then there is a good chance the reasoning expressed will be followed. First, the decision appears to be correct. Second, one hopes that even if the doctrine of precedent doesn't affect the interrelationship between the two courts, the principle of *stare decisis* will, and the High Court will not take issue to any great extent with the reasoning of the Employment Court unless it can be shown to be clearly erroneous. Indeed, the alternative is barely worth considering. If the Employment Court is wrong in the *Axiom Rolle* decision, and it cannot grant injunctive relief beyond the arena of strikes, lockouts, and reinstatement, then there is a genuine lacuna in the law.

There will be a number of employment cases requiring injunctive relief that will simply not be able to be brought in the High Court given the exclusive jurisdiction to hear employment-related matters granted to the Authority and the Employment Court. If those cases cannot be brought in the High Court, and the employment jurisdiction cannot provide the requisite remedy, then injustice will necessarily result.

Chapman Tripp moves into Wellington's new office tower

CHAPMAN TRIPP's Wellington office is moving to the top six floors of a new office tower situated at 10 Customhouse Quay from Monday, 9 October. The firm's new client centre will open in early December.

Chief Executive Alastair Carruthers says the firm is very excited by the move, which has been driven by a desire to give clients and staff high quality meeting and working spaces, and to be a more efficient business. "As one of Wellington's most significant businesses, we are delighted to be anchor tenants in the first premium office tower to be built in recent years. As well as attractive and productive office space and systems for staff, we are building an innovative client centre, which will provide a unique new home for doing business in Wellington."

Starting with a bare floor plan enabled the firm to rethink how it used space. It will reduce leased space by a third, with no increase in occupancy costs. Starting from scratch also allowed the firm to design a workspace specifically to its requirements, for which it engaged Australian-based workplace design firm Geyer, who developed the strategic brief and initial concept design.

Geyer partnered with New Zealand interior designers Warren and Mahoney, who were involved in the design development and construction phases. The consultation process involved reviewing both international contemporary space planning trends, as well the firm's own objectives of team collaboration and a strong focus on clients. "A mixture of cellular and open plan offices will provide both quiet working spaces and a much more collaborative working environment. Clients helped us to design a new floor of facilities that will be focused on them. Staff were involved in testing the new workstations and making decisions about furniture," said Carruthers.

Energy efficiency and sustainability were also important considerations. Said Carruthers, "Our lighting systems will be activated by movement and heat, and we'll have more efficient lifts and air conditioning. As far as possible, sustainably produced materials have been used in the fit-out, and old computers will be donated to schools. We have also reviewed our business processes to ensure that we produce and store less paper."

Telephone systems will be replaced as part of the move. However, contact details for the firm, including its postal address and telephone numbers, will remain the same.

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Minter Ellison Rudd Watts wins ILO Client Choice Award

MINTER ELLISON Rudd Watts has won the New Zealand category in the 2006 International Law Office (ILO) Client Choice Awards. The awards, which recognise the achievements of law firms around the world to add real value to their clients' business, are based upon independent research conducted by the ILO.

Launched in 1998, the ILO is the Official Online Media Partner to the International Bar Association and an International Online Media Partner to the Association of Corporate Counsel. More than 1,000 corporate counsel participated in the research, providing assessments of law firms in 34 jurisdictions with whom they had worked in the past 18 months.

Minter Ellison Rudd Watts was rated as the best New Zealand legal firm when judged against criteria including quality of legal advice, value for money, commercial awareness, effective communication, billing transparency, tailored fee structures, depth of team, response time, sharing of expertise, and use of technology.

Auckland partners Robert Falvey and Andrew Ryan accepted the award at a prestigious ceremony in Chicago on 19 September 2006. Commenting on the recent award, Chief Executive Officer Russell Hay said, "Our lawyers are amongst New Zealand's finest – displaying in-depth industry knowledge, providing tailored solutions to add value to clients' business operations, and consistently demonstrating legal excellence. The award recognises these strengths in our team."

Other jurisdiction winners included Allens Arthur Robinson (Australia), Herbert Smith LLP (UK), Latham & Watkins (USA), Lovells (Hong Kong); the international winner was Baker & McKenzie LLP. Winners from other jurisdictions included Shearman & Sterling LLP, White & Case LLC, and Clifford Chance LLP.



Auckland partner Robert Falvey (on the left) collecting the award on behalf of Minter Ellison Rudd Watts at the ceremony in Chicago

EDITORIAL NOTE

Darise Ogden Editor



I thought the Supreme Court decision on the *Rainbow Warrior* bombing would finally lay the matter to rest – except, of course, for the replaying of events as a matter of historical record. However, it appears I was wrong. In an interesting twist, this weekend, the real bomber was uncovered! 21 years after the fact, and by his own brother, no less. Apparently, Antoine Royal – brother of popular, French presidential hopeful Segolene Royal – told an AFP reporter that their brother Gerard was a French secret service agent, and it was he who attached the bomb to the hull of the *Rainbow Warrior*. Could this be true? Desperate to uncover the facts, I googled 'Gerard Royal' on Sunday. Guess what I found. Nothing.

So, either it's of no interest to anyone else in the world – which is a little sad, if you ask me, because it's a defining moment in our history – or the informant in question lacks credibility. As the race for the French presidency evolves next year, it will be interesting to see whether these allegations gain any more weight.

In our last issue, I decried the sad demise of our local law society libraries; in this issue, we look at the supposed replacement for books – online legal research. Undertaking the research (online, of course), I came across a news item about US map thief Edward Forbes Smiley III, who was recently sentenced to three and a half years' imprisonment. I was intrigued by the story, as a few years ago, I read Miles Harvey's *The Island of Lost Maps*, a book about notorious map thief Gilbert Bland.

It may surprise you to know maps are very big business. We're not talking about a Wises map bought from your local petrol station. We're talking about old maps, rare maps – the maps you most often find as plates in old books. In his book, Harvey talks about an auction he witnessed at Sotheby's, where Lot 599 was an edition of Ptolemy's famous map book *Geographia*, which was printed in Ulm in 1482. Apparently, if you had wanted to buy it in 1884, it would have cost you US\$85, and, in 1984, its value had increased to \$42,500. At the auction attended by Harvey, it sold for US\$1,150,000. It was history in the making: "Once mandatory fees were added, the sale would come to US\$1,267,500 – a world record for an atlas printed on paper."

During his seven and a half year crime spree, Smiley stole 98 maps worth US\$1.9 million. He was discovered by a "sharp-eyed library staffer" said Reuters, "with seven rare maps in his briefcase and tweed blazer after leaving Yale University's rare book library". Apparently, the librarian noticed he had dropped his X-Acto knife blade on the floor.

There's something slightly amusing about this image – heinous crime, though it may be – and I can't help but think of the impact of the digital world on crimes of this nature. The very notion of making things available online is to free up information, to make it available to as many people as possible all over the world (especially where that information is being offered free). However, that can only increase the value of ancient paper products. And while the *Geographia* can excite a man in tweed such that he spends nearly US\$2 million, I just don't see the same excitement arising over Google Earth's shot of my home.

Regardless of which, if you are a law firm or a library with some very old books – I understand Otago Law Society has an incredible collection – then treat them with respect. Do not throw them out when you upgrade to digital, because who knows, that 1970 text on creditors remedies may, one day, be a valuable and desirable antique.

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