

CASENOTE: New Aim Pty Ltd v Leung [2021] FCA 1329

The Applicant, New Aim Pty Ltd (also '**New Aim**') is an online retailer. Its products include a large variety of outdoor furniture, storage, bedding, and fitness equipment. Each of the Respondents, Mr Jack Leung, Ms Jenny Li Yinxue and Mr Lei (Ray) Xiao¹ were previous employees of New Aim who left their employment during 2020.

Applicant's claim

New Aim alleged that the natural person respondents, whilst working with the fifth Respondent, Broers Group Pty Ltd ('**Broers**'), a competitor of New Aim, have provided to Broers information that is confidential to New Aim in breach of their obligations, including statutory, contractual and equitable obligations. New Aim brought an injunction to restrain Broers, and another company Sun Yee International,² together with other Respondents.

A. Background to Injunction

A preliminary hearing was conducted before **Moshinsky J** of the Federal Court of Australia. His Honour noted New Aim's contentions as follows:

- that thousands of suppliers of products in mainland China produce products in categories such as those offered by New Aim;
- further, the quality of many products and the reliability of suppliers varies. Because of that variation, New Aim undertakes very careful due diligence before selecting products and appointing suppliers; and
- New Aim treats the identity of its suppliers (and other information) as highly valuable and proprietary and, subject to limited exceptions, does not disclose the identity of its suppliers (including to customers).

New Aim further contends that it takes steps to make its employees aware that its supplier details are confidential. Both the commencement of competition with New Aim, and the use of New Aim's images in breach of copyright, supported the conclusion that Broers and Sun Yee International have used New Aim's confidential information.

The Applicant sought two main areas of interlocutory relief, being to restrain the Respondents from using supplier information and images said to be subject to copyright; and also for discovery of certain documents relating to the alleged breaches of confidential information obligations. Orders were made for preparation and service of affidavit material and submissions in connection with New Aim's application for interlocutory orders.

B. Hearing of Injunction application

Moshinsky J heard the injunction application. His Honour noted the principles applicable, as set out in the Pacific National decision.³

¹ I refer to the first, second and third Respondents as 'natural person respondents'.

² I refer to Broers and Sun Yee International as 'corporate respondents'.

³ See Australian Competition and Consumer Commission v Pacific National [2018] FCA 1221 at [5]- [15] per Beach J.

His Honour noted New Aim's submission that the natural person respondents and Sun Yee International are working with Broers – though Mr Leung is not paid, nor does he have an employment contract with Broers).⁴

New Aim submits that Broers has sourced 108 different product lines from 18 of New Aim's suppliers. These product lines were set out in a confidential affidavit. New Aim submits that those products are identical or nearly identical to the same products, as sold by New Aim. New Aim contends that Broers is promoting and selling products, and also supplying the products to Sun Yee International, which is also retailing products.

Confidentiality and copyright

The Applicant submits that the confidentiality in the supplier list is derived from the fact that New Aim has conducted extensive due diligence, in order to assess reliability of suppliers; and both status as a supplier to New Aim *and the fact that* the supplier has been assessed as reliable, is what gives the list its confidentiality. New Aim submits that Mr Leung admits that he has retained details of New Aim's suppliers on his mobile phone, creating the inference that Leung has disclosed these details to Broers; the evidence indicates that New Aim's suppliers have been contacted by others within Broers.

New Aim submits that the 'serious issue' element of the injunction was made out by the likelihood of breach of obligations; and that the balance of convenience favoured the grant of interlocutory relief sought. If interlocutory relief is not granted, the commercial value of New Aim's confidential information would be lost. To this end, New Aim compared marketing images used by New Aim, and the other (comprising those used by the corporate respondents) to establish that the images had been taken – rather than the corporate developing their own marketing materials.

Moshinsky J noted the Respondents' admission that there was a *prima facie* case, submitting that despite this, the injunction should not be granted, because the claim that Mr Leung's knowledge of New Aim's suppliers was in breach of any obligation was 'thin'. Further, the Respondents argued that as damages would be an adequate remedy; this was a further ground for the injunction not being granted. As to the copyright claim, the Respondents offered undertakings and did not deny that the Applicant's images had been used.

Moshinsky J found in favour of the Applicant, and found an injunction appropriate. The respondents sought to limit the injunction not to the 108 products alleged by the Applicant, but to the 18 suppliers, whose details were in evidence. **Moshinsky J** declined to limit the injunction and settled upon a definition of 'New Aim Supplier Information' which captured both the identity and contact details of the confidential Chinese suppliers. His Honour then granted the injunction

Significance of the decision

The New Aim decision does not break new ground, but is notable because it is an example of a confidential information case in which the confidential information element is separate from a contractual restraint – in short, the nature of the information taken and its potential use are the 'serious issue' founding the injunction. Also, the New Aim decision demonstrates (as with the Artedemous⁵ litigation, in the NSW Supreme Court) that supplier

⁴ See New Aim decision, [2021] FCA 1328, at [15]-[16].

⁵ Artedomus (Aust) Pty Ltd v Del Casale [2006] NSWSC 146 per Burchett AJ (at first instance) and Del Casale v Artedomus (Aust) Pty Ltd (2007) 73 IPR 326 at 355; 165 IR 148; [2007] NSWCA 172, per Hodgson, McColl and Campbell JJA (on appeal).

information (including the identity of particular suppliers), and other organisational information can be confidential and may serve a basis for relief which is available in equity.

That relief includes the injunction itself, as well as (after trial) the possibility of equitable compensation and delivery-up of the confidential information.

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