

RESTRAINT OF TRADE – THE EMPLOYER’S PROTECTION

There have been a number of decisions over the last 3 years dealing with the enforceability of restraint of trade provisions. Those cases have laid to rest the usual response of lawyers that the courts won't enforce such clauses.

It has always been the case that restraint of trade clauses are enforceable if they are reasonable and their aim is to protect a proprietary interest.

No one is entitled to be protected against mere competition, however a court will enforce a restraint that is reasonable and is intended to protect confidential information, customer connection/goodwill, employee connection and goodwill in the case of commercial contracts.

NON-COMPETE CLAUSES

The most usual restraint is a covenant from an employee by which he/she undertakes not to work for a competitor and/or not to contact clients of the former employer. Such a restraint may be justified on the basis of the need to protect the former employer's confidential information and/or its customer connection/goodwill.

An employer's customer connection restraint is legitimate if the employee has become, vis-à-vis the client, the "human face" of the business, namely the person who represents the business to the customer. The restraint may have to be limited to customers with whom the former employee had a relationship.

It may, however, legitimately extend beyond customers with whom the employee has personal contact where the employee may have acquired influence over or special knowledge of the clientele as a result of the seniority of his or her position, or where the employee's role includes obtaining and extending custom for the employer's business.

Generally, the test of reasonableness for the duration of a non-solicitation covenant, when it is supported by customer connection, is what is a reasonable time during which the employer is entitled to be protected against solicitation, which in turn depends on how

long it would take a reasonably competent replacement employee to show his or her effectiveness and establish a rapport with customers.

CONFIDENTIAL INFORMATION

Restraints based on the protection of confidential information are enforceable but difficulty is usually caused by the lack of specificity in their drafting.

Many such covenants have as their hallmark a generic definition of what constitutes 'confidential information' rather than identifying the category of information sought to be protected. Such lack of specificity leads to the former employer having to "live with the consequences of such ambiguity as may be involved in its choice of words."

Staff connection also constitutes part of the goodwill of a business. It is therefore amenable to protection by a covenant in a manner similar to customer connection, even in the absence of protectable confidences. The solicitation of staff may also constitute the tort of inducing breach of contract.

SUMMARY

If an employer has in place well prepared employment contracts dealing with restraints of trade, it can in fact choose to enforce them and be successful in doing so.

A thorough review should be undertaken and contracts may need to be re-written. It is more difficult to have current employees sign new employment agreements and care will need to be taken if this is going to be contemplated. Current employees are likely to be required to enter into a new employment contract, which could require higher remuneration to be paid to them in light of the restraint of trade clauses now being imposed.

This article has been produced by Carmen Champion, Barrister with her consent. Carmen can be contacted at St James Hall Chambers in Sydney on (02) 9237 0536

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