

Preventing Employees from Taking Your Business Elsewhere

Employers often dread the situation where an employee accepts employment with a competitor or sets up business in competition. Traditionally, employers have sought to prevent or limit the harm they suffer by including restraint of trade clauses in the contracts of their employees, particularly their more senior or executive employees. However, some recent decisions of the New South Wales Supreme Court demonstrate that in certain circumstances, an employer's interests can be protected in this scenario even if an employer and employee have agreed that there will be no restraint of trade clause in the employee's contract.

In *Great Southern E-vents Pty Ltd v Peskops* [2007] NSWSC 382, the Court held that a clause of the defendant's contract may prevent her from dealing with five clients of her former employer. Had this clause been a restraint of trade clause, there would not have been anything unusual about this decision. What made this decision notable, however, was that the defendant had expressly negotiated with the plaintiff to remove a proposed restraint of trade clause from her contract. There was, though, a clause restraining the use of confidential information obtained in the course of or in connection with the defendant's employment and this clause extended after the termination of the agreement. The court accepted the plaintiff's submission that the confidential information inevitably would be used by the defendant in her dealings with the five former clients. This finding is notable even though the case was an interlocutory matter that never went to a substantive hearing.

In *Wentworth Partners Estate Agents Pty Ltd trading as RE MAX Gold v Gordony* [2007] NSWSC 1135, the Court considered whether the defendant, a former employee of the plaintiff, should be prevented from making use of a rent roll that the defendant had emailed to his private email address after having resigned. In this case, there was both a restraint of trade clause and a confidentiality clause in the employee's contract, however, the restraint of trade clause was considered by the Court to be too wide and therefore invalid, since it appeared simply to be a covenant against competition. The confidentiality clause, however, was held by the Court to be valid. The Court acknowledged that the confidential information consisted principally of the rent roll, therefore the same field was covered by the confidentiality clause as would also have been covered by a valid restraint of trade clause and a previous injunction restraining the defendant's conduct in this regard was extended.

The findings in these cases demonstrate that there are broader means by which employers can attempt to protect themselves from employees using the employer's confidential information after the cessation of the employees' employment. These recent decisions provide some comfort for employers in that even if a restraint clause cannot be relied upon, or in circumstances where it has been specifically negotiated out of the employee's contract, there may still means by which to limit an employee's conduct after the termination of the contract. Employers must make sure that employees are aware of what information is confidential by treating it as confidential. Immediately when an employee leaves the employer, the employee's computer should be checked to ensure that confidential information has not been taken. The employer of course must make sure that there is a policy in place to do this.

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