

May 2007

RESTRAINTS OF TRADE

Almost every business acquisition includes a restraint of trade against future competition by the sellers of the business, and often by members of senior management as well.

When the Sear family sold their WA funeral business to Invocare, Marina Sear, who was one of the selling Shareholders, and was also a director and manager of the business, agreed to work for Invocare for the next 10 years. The business was carried on from five different branches. Sear was directly involved in the management of, and with customers in, four of those branches, but she was only indirectly (as a director) in the fifth branch.

Sears' contract with Invocare, imposed a limited restraint on her, from competing with Invocare after the termination of her employment. The restraint was to operate within a radius of 20 kilometres from "any of the premises" where the Vendor's business had been conducted ie the five branches, this being the area from which the bulk of the business was drawn.

The Supreme Court decided that the area of 20 kilometres was reasonable, as was the requirement for a restraint of trade, to protect Invocare's legitimate business interests ie its goodwill and customer connection.

However, the Court held that the restraint was too wide – not because of the 20 kilometre radius, but because it included the fifth branch of the business as well (ie the branch where Sears had not been directly involved as manager).

In the result, the Court **STRUCK DOWN THE ENTIRE RESTRAINT OF TRADE**, and held that the whole restraint was unenforceable.

The principles in these cases are easy to state. An employer is entitled to protection in respect of goodwill, trade connection and trade secrets. However, the application of these principles to multiple factual scenarios is very difficult.

It seems clear that if you want to have an enforceable restraint against competition from senior employees, then the detailed terms need to be carefully worked out in the light of the particular circumstances. The days of the "off the shelf" standard restraint of trade clause are a thing of the past.

Mike Lyons

VPro Lawyers & Corporate Consultants