



## Restraint of Trade

Employers need to be reasonable

**The inclusion of restraint of trade clauses in employment agreements is now commonplace, yet the application and enforcement of these clauses still cause considerable confusion. This article discusses why these clauses are used, and summarises the pitfalls for unwary employers.**

Employers should not view a restraint of trade clause (RoT) as a form of unlimited protection against competition from former employees. On the other hand, a well drafted RoT can provide effective short-term protection against former employees who attempt to exploit confidential information gained at the previous workplace.

### What are restraint of trade clauses?

RoTs prohibit an employee from engaging in a specific activity when their employment comes to an end. An employee who engages in business with the competition while still employed may be in breach of the duty of fidelity.

A typical RoT will prohibit an employee from working in a specific area of employment in a precise geographical area for a limited time. A RoT limits the freedom of an employee to change jobs and is presumed by the courts to be unenforceable unless the employer shows it is reasonable.

A court will not enforce a RoT if there is another means of protecting the employer's interest. If another provision exists in the employment agreement that already protects the employer's proprietary interest, then a court will enforce the less restrictive of the two. Nor will a court enforce a RoT that would make the employee unable to earn a living.

A RoT must be supported by consideration which means that some benefit must be given to an employee in exchange for the promise to restrict the way they will work when the employment finishes. Valid consideration does not necessarily need to be in the form of remuneration. For example, the acceptance of reciprocal restraints by the employer may be seen as reasonable consideration.



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### Must be reasonable

An employer relying on a RoT must show that it is reasonable. A court will look at all the circumstances of a case to determine this. Generally a RoT will be held to be reasonable if it affords adequate, but not more than adequate, protection for the employer.

Previous cases highlight several key factors that are taken into account when assessing reasonableness. Some of these include:

#### 1. Proprietary interest

A RoT will not protect an employer from mere competition from a former employee; a covenant that simply attempts to prohibit an employee from associating with competitors is unenforceable.

The employer's claim for protection must be based on an identifiable advantage, which is inherent in the business and can be regarded as his or her 'property'. Commonly, an employer may use a RoT clause to stop an employee from taking confidential information or trade secrets to competitors when they leave.

Whether an employer has a legitimate proprietary interest or the right to confidentiality will depend on the facts of the case. An employer cannot seek to prohibit a former employee from using the additional skills and experience gained in the ordinary course of employment. The proprietary interest that the employer is seeking to protect must be distinct from the additional skills,

experience and knowledge gained while they were employed.

A court will however pay particular attention if the employee has established a close relationship with the employer's clients or customers, and can influence them. In such cases, the employer may be seen to have a proprietary interest in the performance of the employee's work, but only if the employee's position is such that they have the power to entice customers away.

#### 2. The nature of the employment

Before declaring a RoT valid, a court will look at the employee's position. It must be established that the employee bound by the restraint had access to information that may be deemed confidential.

A clause restraining a junior employee will be hard to justify as reasonable as they are unlikely to have access to information that warrants protection.

#### 3. Area and length of restrictions

A valid RoT must be limited in terms of time and space. The longer the restriction is to apply and/or the more extensive it is in terms of geographical area, the more difficult it is to establish reasonableness.

Restraints for periods of six months or less have commonly been upheld as reasonable. A RoT which the court considers excessively long will not necessarily be struck down completely; the court may reduce its period.

## 4. Bargaining positions of the parties and the time of entering into the restraint

The validity of the restraint will be assessed at the date on which it was agreed. It is less likely that a RoT made after the employment relationship started will be enforceable.

Similarly, a RoT may not be enforceable where, at the time it was agreed to, substantial bargaining inequality existed between the parties. Bargaining inequality may be established for example, if legal advice was only available to the employer at the time at which the terms of employment were agreed.

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### Relief available

Where an employment contract imposes an unreasonable RoT, a court has wide discretion to modify the restraint provision. Modifications may include deletion of the clause, changes to the geographical area of the restraint or changes to the duration of the restraint. A court's chief concern is to modify the clause in such a way that the employment agreement would have been reasonable at the time of employment.

On the other hand, where an employee is held to be in breach of a restraint of trade covenant, the courts may award damages in favour of the employer.

### Conclusion

Restraint of trade clauses cannot be used by employers to provide unlimited protection from competition from former employees. A clause that goes beyond restraining an employee for just long enough to allow the employer to continue business normally is unlikely to be enforceable. A successful restraint of trade clause will need to be reasonable, precise and relate to the specific parties.

# Why Have a Will?

Ensures your wishes are carried out

**Most people know that, by making a Will, provisions are made to care for loved ones and arrangements are made for the management of their affairs and distribution of assets after their death. This article points out why everyone should have a Will.**

Prudent management of your affairs most certainly includes making a Will and reviewing it regularly. To die intestate (without having ever made a Will) greatly complicates and delays the administration of your estate, and also adds to the costs involved. At a time of emotional upheaval, the last thing your loved ones need is the extra stress of having to deal with an intestacy.

## What does a Will include?

Matters generally covered in a Will are:

- The name of the person or persons whom you wish to administer your estate and any trusts after your death (the executor/s and trustees)
- Any specific arrangements that you want for your funeral and burial place or cremation
- Bequests to charities or people who you wish to receive cash or personal items
- Appointment of a testamentary guardian for dependent children – who you know will protect your children's needs
- Detailed trusts can be established by a Will to enable your trustees to provide for beneficiaries, sometimes in unequal shares. It may be important that funds be applied for the benefit of a child or children still receiving education, in preference to independent children
- You may have a child with a disability who will need special assistance, and
- Directions about how your business is to be continued. If this is not included, the business may have to be sold immediately after your death.

## Will drafted by your lawyer

It is vital that not only that your Will is drafted correctly so your wishes are carried out, but also that it is signed and witnessed correctly. This is why a Will should be signed with your lawyer present to ensure that the legal requirements are met. Do-it-yourself (DIY) Wills are usually invalid because they are not properly signed and witnessed.

It is prudent to get your lawyer to prepare your Will rather than do it yourself. DIY Wills are a constant source of expensive court proceedings which can lead to a great deal of distress for your family.

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**Your Will is a very important personal matter. It should be prepared by an experienced legal professional who will advise you and ensure your wishes are carried out.**

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In a recent High Court case in Hamilton the difficulties and pitfalls of drafting and executing one's own Will were highlighted when the court heard of a person who created and signed two Wills on the same day.

M had obtained a home-made Will kit and used it to record his testamentary intentions. After he died in March 2001, it was discovered that he had executed two documents, both of which were believed to be his last Will. The two documents were dated '8th December 2000' and '8th 2000' respectively. Both documents were signed by the same witnesses. It was established that the Wills were signed on the same day, but no one could remember which one had been signed first. There was no question that M had testamentary capacity to sign both documents.



The difficulty arose when the trustees tried to obtain probate for the Wills. It required a formal application to the High Court and required all people affected by the Will and who might have some claim to the estate, being served with the proceedings and being required to instruct lawyers to represent them.

Fortunately, the Wills were very similar. If there had been a dispute, or if the contents of the Wills were significantly different, the case would have been even more complicated. Even so, the matter was not resolved until it went to court in November 2003, 18 months after M's death, and significant costs were incurred by all concerned.

## Reviewing your Will

We recommend that your Will is reviewed at least every five years. It may be relevant to do so more often, particularly:

- If your family situation changes substantially
- Following the death of any trustee or beneficiary named in the Will
- If you are aware that any specific asset in the Will has been disposed of
- Following separation
- If you are diagnosed with a serious medical problem, or
- If you are entering into a relationship or have signed a property relationship agreement.

Remember that, unless it states otherwise, a Will made before marriage is revoked by the marriage. This is so even if you have married your partner who has been a beneficiary in your Will made prior to that marriage.

## Conclusion

Your Will is a very important personal matter. It should be prepared by an experienced legal professional who will advise you and ensure your wishes are carried out.

# Resource Management Act

## Liability issues in prosecutions

**In the first half of this article published in Spring 2006, we discussed the risk to clients arising from the choice made by a local authority whether to issue a Prosecution or Infringement Notice. In this second section, we look at the difficulties in avoiding liability if a prosecution is commenced and offer suggestions to minimise the risk of prosecution in the first place.**

### Strict liability

In any prosecution under ss9-15 of the Resource Management Act (RMA), it is not necessary to prove that the defendant intended to commit the offence. Rather, the offences created are of strict but not absolute liability.

S341(2) however, sets out two statutory defences. Reversing the onus of proof, the defendant must prove (on the balance of probabilities) that the unauthorised action or event was:

- Necessary for the purposes of saving or protecting life or health or preventing serious damage to property or avoiding adverse effects on the environment and the conduct of the defendant was reasonable in the circumstances and the effects were adequately mitigated or remedied, or
- Due to an event beyond their control, including natural disaster, mechanical failure, and sabotage and in each case the action or event could not reasonably have been foreseen. If foreseeable, the event could not reasonably be provided against; and the effects were adequately mitigated or remedied.

This is illustrated with an example where holding ponds for dairy effluent might overflow and enter waterways in storm events, or if there is mechanical failure. Storm events and mechanical failure are foreseeable and can reasonably be provided against. Extreme storm events, while arguably foreseeable, might not reasonably be provided against.

In short, a defence will not be available if the offender has not taken steps reasonably open to prevent the danger. Robust and regular compliance audits therefore are a very good, if not essential, risk management tool.

The range of penalties now imposed make compliance audits financially worthwhile as fines over \$50,000 are not uncommon for some offences.

Notwithstanding the strict liability approach of the RMA, there must be a link between the defendant and the events giving rise to the offence. The prosecution must still prove beyond reasonable doubt that the defendant's action caused the offence to occur. The following case study provides a good example of that.

### Case study

An incorporated trust ran a dairy farm with surrounding land used for other dairy farms, crops and grapes. A helicopter company was contracted to aerial spray a herbicide to kill weed in its pasture. Experienced in ag-chemical applications, the helicopter company had been used on previous occasions without any problems.

A month after spraying, neighbouring grape growers complained their grapes showed signs of herbicide damage. The regional council investigated and subsequently prosecuted the helicopter company, the pilot, the trust and the trust's principal director.

None of the four defendants were likely to bring themselves within any of the statutory defences, so the central focus was on causation. As a result, the defendants obtained evidence that causation had not been established beyond reasonable doubt, ie: no action of theirs had caused the damage. The regional council withdrew all the prosecutions.

### Liability of principals for acts of agents

S340 provides that where an offence

is committed by any person acting as an employee or as an agent (including any contractor) of another person then they are liable to the same extent as if they had personally committed the offence even if the offender is not convicted.

As with the strict liability provisions, there are two statutory defences which the defendant must prove, ie: another reverse onus of proof situation.

- They did not know, or could not reasonably be expected to have known, that the offence was to be or was being committed; or
- Even where there is knowledge or constructive knowledge, all reasonable steps were taken to prevent the commission of the offence.

In addition, s340 (3) states a body corporate can be convicted of an offence against the Act, including every director and person concerned in its management.

It is clear that directors and company officers, and employers and principals cannot adopt a passive role in terms of environmental responsibility, especially where the business or undertaking involves ongoing environmental compliance obligations. Regular compliance audits are an important part of those processes.

### Whangarei case

The importance of regular compliance audits is illustrated by a mid-2005 decision<sup>1</sup>. Landcorp Farming owned land adjacent to a stream tributary used by

*(Continued on page 6)*

<sup>1</sup> Northland Regional Council v Skywork Helicopters Limited and Duncan Gourley (Whangarei District Court Doogue DCJ, 24 June 2005).

# ING launches two more quality fixed interest funds

ING (NZ) Limited has launched two new funds, the Enhanced Yield Fund and the Credit Opportunities Fund, that provide two more high quality, diversified options for your portfolio.

After the success of the ING Diversified Yield Fund (one of the fastest growing funds in New Zealand's history) and the substantial growth of the ING Regular Income Fund, the new suite of products adds a further dimension to the diversified fixed interest solutions available from ING. A brief summary of the new funds is below.

## Enhanced Yield Fund

- A low to medium risk investment designed to provide a consistent and stable return above the cash rate
- Has the objective to outperform the New Zealand 90 day bank bill rate by 0.50% pa after fees, before tax. This would translate currently to a return of 8.20%\* pa
- Invests in conventional New Zealand interest rate securities, with up to 25% of the portfolio invested in international debt securities, which are fully hedged to the New Zealand dollar



- Designed as an alternative New Zealand fixed interest solution for investors seeking to manage the risk/return opportunities available within this sector
- 100% hedged to the New Zealand dollar ie: unaffected by exchange rate fluctuations, and
- Distributes income on a quarterly basis.

## Credit Opportunities Fund

- A medium to high risk investment designed to target attractive 'absolute' or 'total' returns independent of a market index
- Has the objective to outperform the New Zealand 90 day bank bill rate by 2.25% pa after fees, before tax. This would translate currently to a 9.95%\* pa return
- Invests in a selection of global structured credit securities, principally credit opportunity funds (COFs), together with investments in debt securities and cash, and
- Suited to investors seeking to achieve competitive returns, while adding diversification to the income component of their portfolios (recommended minimum investment horizon of three years or more).

ING now has one of the most comprehensive suites of diversified fixed interest funds, with varying levels of risk to suit the needs of a wide range of investors. If you would like to know more about these new funds, please contact us and we will put you in touch with your local Portfolio Group adviser.

\* The earning rates shown in this document are before tax and are an annualised return, NZ dollar adjusted. The earning rates are not guaranteed and are subject to change without notice, nor is the repayment of capital guaranteed.

Source: *Strategi Limited*

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## Preserving separate property

Under the Property (Relationships) Act 1976, separate property owned prior to the relationship can inadvertently become relationship property if the separate property is disposed of and replaced with another asset.

If the replacement asset is acquired after the relationship began and for the common use or common benefit of both partners, then it becomes relationship property. In such situations a Contracting Out Agreement pursuant to s21 of the Act is required to protect the separate property.

*This edition's Postscript is shorter than usual. A full column will resume with the Autumn 2007 issue.*

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local farmers for irrigation. Landcorp contracted Skywork Helicopters (and pilot, Mr Gourley) to undertake aerial herbicide weed spraying on its property. A month after spraying, crop growers downstream noticed plants and crops dying. After extensive investigations, the local council concluded that the downstream crops had been poisoned by herbicide in the irrigation water taken from the stream. Prosecutions were laid against pilot Gourley, and against Skywork Helicopters as Mr Gourley's employer.

The prosecution case comprised a number of interlocking pieces of circumstantial evidence on which the court found that causation had been proved beyond reasonable doubt and there was no event beyond the control of the pilot, and therefore his statutory defence failed.

However, as far as the liability of Skywork Helicopters Limited was concerned, the court was told that rigorous assessment and supervision of Mr Gourley had been carried out by Skywork.

As a result, the court concluded that Skywork Helicopters had established that neither the directors nor any person concerned in the company management knew that the offence was going to occur or could reasonably be expected to know it would occur. The company had adopted organisational and training methods which were sound and it was not liable, in the circumstances, for the human error which occurred.

That is the crunch. If there are sound organisational and training methods, then the likelihood of the employer or principal being able to establish one of the statutory defences is greatly improved.

The moral of the story? If your organisation faces ongoing RMA compliance obligations, ensure there are good systems and training in place, and regular compliance audits are undertaken. If someone from an enforcement agency turns up and wants to talk with you about an alleged offence, talk with us first. Together we will talk with the agency to ascertain if any action can be limited to either compliance or the issuing of an Infringement Notice only, rather than a District Court prosecution which could carry much greater penalty.

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