# Restraining order

## Why the NSW Supreme Court enforcement of a non-competition restraint preventing former employees working with a competitor has key learnings for insurance professionals.

**BY SAM INGUI**

A recent decision in the NSW Supreme Court has demonstrated that a properly worded non-competition restraint clause in an employment contract can be enforced even when employees offer undertakings not to solicit the employer's clients. This was evidenced in the *OAMPS Gault Armstrong Pty Limited & Anor v Glover & Anor* [2012] NSWSC 1175.

### The background

Andrew Glover and Simon Gosnell were experienced marine insurance brokers employed by OAMPS. In March 2012, they were retrenched by OAMPS. Their employment contracts provided that they had to be given six months' notice plus a severance package. At OAMPS' election, both were consigned to 'gardening leave'.

The employees were, under their contracts, then restrained after their employment ceased, not just from contacting clients in the marine industry for up to three years, but were also required not to work in the same industry in competition with OAMPS. Significantly, the contracts said that this was to protect OAMPS' goodwill.

However, some time before the expiry of the notice period in September 2012, the employees had obtained new employment (in this case with FB Marine Insurance). This was obvious given that the very day after the notice period officially ended, FB issued a media release welcoming the employees into their fold. The next day, two prominent marine ▸▸

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clients informed OAMPS that they would switch their business to FB.

OAMPS wrote to the men and accused them of breaching their restraint covenants. OAMPS demanded that they sign undertakings not to work for FB, although the judgment does not state the period of time that they were demanded to be restrained. The men refused to comply with the non-competition demand but did offer not to solicit any of the clients that they had acted for while at OAMPS in the 12 months prior to September 2012. OAMPS was not satisfied and started legal action to restrain their former employees.

## The case

The employees' offer was not without some method. The offer not to solicit clients was a substantial one and not without hope.

Legally, a restraint does not entitle an employer to anything more than what they would otherwise need to protect a legitimate interest. An offer not to solicit clients is often enough to protect an employer's interests. An employer who rejects such an offer had better have a good reason as to why it is not enough.

Here, OAMPS clearly thought that they had a good chance of getting more. The evidence of a senior officer of OAMPS was that clients of brokers bonded over the life of a policy. In order to maintain the goodwill that OAMPS had established, their former employees had to be removed from the game to give OAMPS a chance to establish new relationships with their clients with new brokers in the business. If the former employees could work for a competitor who had acquired two of their clients, then others could follow and OAMPS' ability to keep the clients was compromised.

OAMPS' argument was successful, at least in the short term, as the Judge granted it an interim injunction. Until final hearing, the employees could not work for FB in marine insurance broking – even though they made undertakings not to solicit OAMPS' clients. (NB – usually, once an interim injunction is granted, few matters proceed to final hearing.)

The court thought the non-solicitation offer was not enough and the Judge agreed with OAMPS that merely promising not to contact clients and not to deal with any confidential information left the employees scope to do more that could have been inconsistent with their promises not to compete, contained in their contracts.

## Lessons and observations

Cases where employers try to enforce non-competition clauses often turn against them if the employee offers a tempting non-solicitation undertaking. Employers in such cases have to come to court armed with substantial evidence as to why such offers are not sufficient if they want to succeed with a non-competition clause.

Here, OAMPS did so and outflanked the employees as the case came on for hearing very quickly – two days after the filing of OAMPS' summons in the court.

It is always difficult for respondents to injunctions to be immediately prepared on the first return date of the application. The employees here had to get their case organised quickly and thoroughly, but on extremely short notice.

Employers who wish to enforce non-competition restraints have to get their case worked out and have a good answer as to why an offer not to solicit clients is not good enough. Employees who make such an offer cannot assume that the offer alone is enough. If a court case as to why a non-competition clause should be enforced is made out, then they may have little time to respond.

Employees need to consider and anticipate arguments that could be raised by an employer and be ready to respond almost instantly. NLBA

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