

NEWSLETTER

Legal Up-Date

March 2007

RESTRAINING FORMER EMPLOYEES – THE CACTUS IMAGING CASE

Facts

- 27/4/99 Glen Peters commences employment with Cactus Imaging Pty Ltd (“Cactus”)
- 2003 Glen Peters appointed NSW Sales Manager by Cactus
- 28/9/05 Glen Peters takes up employment with Display Bay Pty Limited (different sort of business from Cactus)
- 18/2/06 Glen Peters takes up employment with Metro MediaTechnologies Inc (“Metro”), Cactus’ main competitor

Employment Contract

In the written contract between Cactus and Glen Peters:

1. Confidentiality

There was a clause in which Peters agreed not to disclose any information which he might receive arising out of or in the course of his employment (other than that already in the public domain) to any other party.

2. Protection of Cactus’ Goodwill

There was also a clause in which Peters agreed for a period of twelve (12) months after the end of his employment not to -

- (a) be engaged in any business of the same nature within NSW;
- (b) canvass, solicit or endeavour to entice away from Cactus any person who or which had at any time during the preceding twelve (12) months been a client or customer of Cactus;
- (c) solicit, interfere with or endeavour to entice away any employee, consultant or contractor of Cactus; and
- (d) not to counsel, procure or otherwise assist any person to do any of the acts referred to in (b) and (c) above.

Decision

The Judge referred to the *Restraint of Trade Act 1976 (NSW)* (the “Act”) and the fact that although at common law restraint of trade clauses are contrary to public policy and void unless they can be shown to be reasonable having regard to the interests of the parties concerned and the public, the Act applies in NSW. In his decision the Judge stated that:

- the Court must determine:
 - first, whether the alleged breach (independently of public policy considerations) does or will infringe the terms of the restraint properly construed;
 - second, whether the restraint in its application to the breach is against public policy; and
 - third, if not, then the restraint will be valid unless the court considers it necessary to make an order pursuant to the Court’s powers under the Act to ‘read down’ the restraint provision.

- Peters had, in his capacity as NSW State Manager, acquired detailed knowledge of Cactus’ internal production costs, pricing parameters, quoting methods and scheduling software which would provide a competitor with a commercial advantage. Further, as NSW State Manager, Peters had direct access to client account managers and had acquired knowledge of the client’s particular needs, requirements and ‘idiosyncrasies’.
- It was therefore reasonable for Peters to be restrained for 12 months after ceasing employment with Cactus (that is, to 28/9/06) from soliciting any customers of Cactus who had been customers during the preceding twelve (12) months.
[NOTE: This restraint applied even to customers with whom Peters had never dealt personally]
- It was also reasonable for Mr Peters to be restrained from soliciting or enticing any of Cactus’ NSW employees, contractors or subcontractors for a period of 12 months.
[NOTE: The Court considered employees to be in the nature of intangible benefits, giving the business a value over and above the value of the assets employed in it and thus comprising part of the goodwill of the business]
- In determining that the 12 month period was reasonable, the Court had regard to the fact that the restraint period had been agreed, the volume of client contact, the period of time it would have taken a new employee to develop his or her competence and rapport with the client, the nature of the confidential information that the employee has retained and the employer’s legitimate interest in protecting this.

Conclusion

This case illustrates the Supreme Court’s willingness to uphold a well drafted restraint of trade clause in an employment agreement.

INDEPENDENT CONTRACTORS LEGISLATION

The Federal Government has recently passed two new bills relating to Independent Contractors - the Independent Contractors Bill 2006 (the “ICB”) and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (the “WRLA”).

The principal bill is the ICB. In summary the ICB:

- does not define the term ‘Independent Contractor’ beyond its common law meaning. The common law has developed a number of tests to distinguish between an employee and an independent contractor. The leading case in this area is *Steven v Broadribb Sawmilling Co Pty Ltd*. That case makes it clear that the Court will look

at a number of indicia although the most important is the *power of control over the work* (emphasis added);

- overrides the 'deeming provisions' contained in the State and Territory industrial legislation (for example, Schedule 1 of the *Industrial Relations Act 1996 (NSW)* which deems certain workers to be employees). The rationale for this was that if there were no deeming provisions, there might be a significant degree of inequality of bargaining power between the worker and the provider of work.
- preserves existing protections for outworkers contained in State and Federal legislation;
- provides a default minimum rate of pay for contract outworkers in the textile, clothing and footwear industry where an outworker is not guaranteed a minimum rate of pay under State and Territory laws;
- preserves existing protections for owner drivers in the road transport industry in NSW and Victoria;
- excludes State and Territory unfair contracts provisions; and
- gives Independent Contractors greater access to unfair contracts laws by allowing the Federal Magistrates Court as well as the Federal Court of Australia to hear applications to review harsh or unfair arrangements. (In making a determination in these matters Courts may have regard to the relative bargaining power of the parties, any undue influence on a party to the contract and whether the contract provides total remuneration less than an employee performing similar work would receive.)

The WRLA introduces prohibitions on 'sham' arrangements (Sections 900 and 901) while at the same time providing defences (of belief and not being reasonably expected to know that an arrangement was in fact an employment arrangement) to persons charged with contravening the sections. There are penalties for being in breach of Sections 900 and 901 (a fine of \$6,600 for individuals and \$33,000 for corporations)

Conclusion

If you engage independent contractors in the course of your business, you should be careful to assess whether these individuals are correctly characterised as independent contractors and review your agreements to ensure the terms are not unfair or harsh.

For specific advice on issues concerning independent contractors please contact Michael Kobras of this firm.

DIRECTORS MUST TAKE THEIR OH&S OBLIGATIONS SERIOUSLY

It may come as a surprise to many that in a decision of the Supreme Court in September last year – *Inspector Ken Kumar v David Aylmer Ritchie* - the Court found a CEO (whose defence was that his remoteness from the day-to-day activities of the company absolved him of liability) guilty of breaches of OH&S obligations.

The Occupational Health and Safety Act 2000 (NSW) imposes criminal liability for certain breaches; its aim being to protect individuals' safety in workplaces by promoting safe systems and structures within companies.

Facts

The Owens Group comprised 30 companies and operated internationally. One of its companies – Owens – ran a tank-washing facility in Auburn, Sydney. On 15 January 2003, one of Owens' employees was killed while attempting to remove residue resin from a tank. In attempting to do so, he was using a highly volatile and flammable cleaning agent and the tank exploded throwing the employee seven metres through the air.

Owens pleaded guilty to charges laid by WorkCover. Pursuant to the Act, Mr Ritchie, as CEO of the group and a director of Owens, was also charged personally and pleaded not guilty. Mr Ritchie argued:

- (a) that he was too remote from Owens' operations and had little or no practical influence on OH&S matters in his role running the large and international group. He also argued that his OHS obligations were fulfilled by relying on each division's General Manager and those reporting to the General Managers; and
- (b) in the alternative, that he had exercised due diligence to prevent the breach by reviewing OHS specialists' reports that kept him up-to-date with safety concerns and by making inquiries about safety in his regular visits to sites.

The court held that:

- consistent with the Act's imposition of strict liability on corporations is the like **presumption of guilt** of all directors ("the operative minds of the corporation");
- by virtue of his position in the group, Mr Ritchie did have authority to influence Owens' conduct in relation to the breach – he could have sought a policy of safe audits of the wash-bay sites that would have acknowledged the danger inherent in using the relevant cleaning agent; and
- as to the alternative defence, there is an anomaly in a director raising the due diligence defence while also arguing that he was not in a position to influence the company in relation to the breach. In any event, Mr Ritchie had failed to demonstrate knowledge of the wash operation, the chemicals used, the need to earth the facility as well as the lack of protective clothing being used at the time.

Conclusion

All high-level directors should remain involved in their companies' OH&S systems and show that so far as possible they are aware of **all** potential safety risks and doing **everything** possible to avoid a breach of OHS legislation.

YOUR FEEDBACK

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interests you covered, please drop us a line at:

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