Is Restraint of Trade a useful tool?

In recent times, employers have looked to include restraint of trade covenants in employment agreements on the assumption that the mere existence of the restraint of trade would protect their business.

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It is important to note that the existence of a restraint of trade clause does not necessarily protect an employer from competition.

The employer needs to show that there is a proprietary interest or trade secret that lies at the heart of the rationale for the inclusion of a restraint of trade.

In common law, restraint of trade clauses are prima facie unenforceable unless they are reasonable and in the interests of public policy.

For such clauses to be valid, they must be reasonable as between employer and employee, and in the public interest.

Two important ingredients feature in a common restraint – namely that the restraint is for a specific period of time and is in respect of a specified geographical area. The overall enforceability of a restraint depends on the following criteria being established by the employer, namely:

- Whether the employer has a proprietary interest capable of protection and which aligns to the employer's business;
- Whether it is reasonable that a specified activity be restrained;
- Whether the period of restraint is reasonable; and
- Whether the geographical limit of the restraint is reasonable.

The reasonableness of the length of time for a restraint to operate depends on the circumstances of each particular case. Restraints for periods of 2, 3 or 6 months have commonly been upheld as reasonable.

In Asiaciti Trust New Zealand Limited v Harris (2013), the Court declined to enforce a 12 month restraint against Ms Harris. Ms Harris' level of employment did not warrant a wide restraint. The restraint was considered to be too restrictive upon Ms Harris' future employment.

Asiaciti was found by the Court to have failed to provide sufficient evidence to establish a clear link between the proprietary interests needing protection and the duties and the responsibilities of the employee within the workplace.

The importance of having a proprietary interest or a genuine legitimate business to protect was underscored in Transpacific Industries Group Limited v Harris where two former employees successfully argued that the restraint was a mere non-compete clause without the necessary linkage indicating a proprietary interest that needed to be protected.

There have also been instances in the past, ie Gallagher Group Limited v Wally (1999) where the Employment Court has reduced the term of the restraint to provide a more balanced restraint of trade.

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Overall, restraints of trade still provide a valuable level of protection for employers, provided the criteria of the restraint are reasonable in the circumstances relevant to the proprietary interest that the employer is trying to protect.

It will be important to customise the restraint period and geographical area of enforcement accordingly.