New South Wales
Court of Appeal

CITATION:	**Hanna v OAMPS Insurance Brokers Ltd (ACN 005 543 920) [2010] NSWCA 267** **This decision has been amended. Please see the end of the judgment for a list of the amendments.**
HEARING DATE(S):	5 October 2010
JUDGMENT DATE:	19 October 2010
JUDGMENT OF:	Allsop P at 1; Hodgson JA at 51; Handley AJA at 52
DECISION:	Appeal dismissed with costs.
CATCHWORDS:	EMPLOYMENT LAW – post-employment restraint deed – cascading clause not void for uncertainty – individual covenants all capable of being understood and complied with without breach of any other – no requirement for mechanism of order of operation - EMPLOYMENT LAW – restraint covenant – whether provisions amounting to repetitive and overlapping restraints were against public policy under the Restraints of Trade Act 1976 (NSW), s 4(1) - EMPLOYMENT LAW – restraint covenant – reasonableness of restraint period – no legally required test – the use of one test or another depends on the facts and evaluation of the approach that is reasonable
LEGISLATION CITED:	Restraints of Trade Act 1976 (NSW) s 4(1)
CATEGORY:	Principal judgment
CASES CITED:	Austra Tanks Pty Limited v Running [1982] 2 NSWLR 840 Brendon Pty Limited v Russell (1994) 11 WAR 280 Davies v Davies (1887) 36 Ch D 359 Extraman (NT) Pty Limited v Blenkinship [2008] NTSC 31; 23 NTLR 77 Hydron Pty Limited v Harous [2005] SASC 176 J.Q.A.T Pty Limited v Storm [1987] 2 Qd R 162 Koops Martin v Dean Reeves [2006] NSWSC 449 Lloyd's Ships Holdings Pty Limited v Davros Pty Limited [1987] FCA 70; 17 FCR 505 Miles v Genesys Wealth Advisers Ltd [2009] NSWCA 25

	Northern Tablelands Insurance Brokers Pty Limited v Howell [2009] NSWSC 426; 184 1R 307 OAMPS Insurance Brokers Ltd v Hanna [2010] NSWSC 781 Run Corp Ltd v McGrath Ltd [2007] FCA 1669; (2007) ATPR 42-198 Schindler Lifts Australia Pty Limited v Debelak [1989] FCA 311; 89 ALR 275 Sear v Invocare Australia Pty Limited [2007] WASC 30; (2007) ATPR 42-149 Stacks Taree v Marshall [No 2] [2010] NSWSC 77 Stenhouse Australia Ltd v Phillips [1974] AC 391 Tyser Reinsurance Brokers Pty Limited v Cooper [1998] NSWSC 689
TEXTS CITED:	J D Heydon, The Restraint of Trade Doctrine (2008 LexisNexis Butterworths 3rd Ed)
PARTIES:	Peter Hanna (Appellant) OAMPS Insurance Brokers Ltd (ACN 005 543 920) (Respondent)
FILE NUMBER(S):	CA 2010/208648
COUNSEL:	A Moses SC, Y Shariff, V Brigden (Appellant) J J E Fernon SC, J Darams (Respondent)
SOLICITORS:	Colin Biggers & Paisley (Appellant) Lander & Rogers (Respondent)
LOWER COURT JURISDICTION:	Supreme Court
LOWER COURT FILE NUMBER (S):	2010/208648
LOWER COURT JUDICIAL OFFICER:	Hammerschlag J
LOWER COURT DATE OF DECISION:	27 July 2010
LOWER COURT MEDIUM NEUTRAL CITATION:	OAMPS Insurance Brokers Ltd v Peter Hanna [2010] NSWSC 781

IN THE SUPREME COURT
OF NEW SOUTH WALES

COURT OF APPEAL

2010/208648

ALLSOP P
HODGSON JA
HANDLEY AJA

Tuesday 19 October 2010

PETER HANNA v OAMPS INSURANCE BROKERS LTD (ACN 005 543 920)

Headnote

[This headnote is not part of the judgment.]

The appellant, Mr Hanna, an experienced insurance broker who commenced employment with the respondent insurance broking firm ("OAMPS") in 1990, resigned from OAMPS on 22 April 2010, having accepted an offer to work at another insurance broking firm. His resignation was effective from 28 May 2010.

During his employment with OAMPS, on 30 September 2008 Mr Hanna signed a written employment contract, a schedule to which contained a post-employment restraint deed.

After Mr Hanna left OAMPS, a dispute arose between the parties concerning the enforcement of the restraint covenant. The covenant contained a cascading or step clause with 9 restraints, the widest period and area being 15 months in Australia, and the narrowest being 12 months in, in Mr Hanna's case, the metropolitan area of Sydney. On 30 July 2010, the Court made orders enforcing the restraint covenant for 12 months throughout Australia.

The appellant appealed against orders 1(a), 1(b) and 4. Order 1(a) restrained Mr Hanna from directly or indirectly "canvassing, soliciting, or dealing with, or counselling, procuring or assisting another person to canvass, solicit or deal with, any of the clients listed in annexure A" to the orders. Order 1(b) restrained Mr Hanna from directly or indirectly "soliciting, or counselling, procuring or assisting another person to solicit, any of the clients listed in annexure B" to the orders. Order 4 was an order that Mr Hanna pay OAMPS' costs of the proceedings.

The questions on appeal concerned whether the covenant was void for uncertainty, its reasonableness, the primary judge's failure to apply the test in *Stacks Taree v Marshall [No 2]* [2010] NSWSC 77, and the primary judge's findings in relation to reasonableness and the 12 month restraint period.

Held, dismissing the appeal (per Allsop P, Hodgson JA and Handley AJA agreeing):

1. The restraint deed was not void for uncertainty. It was clear that the various restraint periods and areas were part of separate and independent provisions, all capable of being understood and complied with without breaching any other. Neither their operation nor any principle of law concerned with certainty of contract required a mechanism or hierarchy of

order of operation.

J.Q.A.T. Pty Ltd v Storm [1987] 2 Qd R 162 followed.

2. The restraint deed was not against public policy by reason of multiple and several operation of the restraint deed's cascading clause.

3. The restraint covenant was not unreasonable. The reasonableness and validity of a restraint clause should be assessed at the time of entry into the contract.

4. There is no legally required test in assessing the reasonableness of the duration of the restraint period. The use of one test or another depends on the facts and the evaluation of the approach that is reasonable.

Stenhouse Australia Ltd v Phillips [1974] AC 391; *Miles v Genesys Wealth Advisers Ltd* [2009] NSWCA 25 followed.

5. The primary judge was entitled to find on the evidence that the 12 months restraint period was reasonable.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

2010/208648

ALLSOP P
HODGSON JA
HANDLEY AJA

Tuesday 19 October 2010

PETER HANNA v OAMPS INSURANCE BROKERS LTD (ACN 005 543 920)

Judgment

1 ALLSOP P: The appellant (Mr Hanna) is an insurance broker who was employed by the respondent insurance broking firm ("OAMPS") from 1990 to 28 May 2010. Mr Hanna had about ten years experience in insurance broking before he began his employment with OAMPS.

2 On 22 April 2010, Mr Hanna resigned from OAMPS, having accepted an offer to work for another insurance broking firm. His resignation took effect on 28 May 2010.

3 On 30 September 2008, Mr Hanna signed a written employment contract, a schedule to which contained a post-employment restraint deed. The relevant portions of the employment contract and restraint deed were as follows:

"Position

You are employed on a permanent full-time basis in the position of Client Director with OAMPS Insurance Brokers Pty Ltd (the "Company"), a business unit within the Wesfarmers Insurance Division. You may be required to perform the duties of that position and may be required to perform other duties or fill other positions as directed from time to time.

Your continuity of service will be maintained in respect of calculating leave entitlements.

...

Confidentiality

You shall not at any time during the agreement period or after its termination discuss or disclose information including confidential information, processes, materials, costs, or secrets relating to any aspect of this agreement or any of the business or other affairs of the Company or any of its related companies or clients of the Company or any of its related companies to any person without the Company's express agreement, except that which may be required in the performance or discharge of duties under this agreement.

You shall not make use of any such information, process or document to which you have had access during the period of your employment at any time during the agreement period or after its termination except on behalf of the Company, and in particular you will not use such information for your own purpose or for any purpose which is adverse to the interests of the Company.

Without limiting the generality of the above, confidential information includes the following:

· The Company's client and supplier lists;
· Information about the Company's clients;
· The Company's financial information including prices, costs and margins;
· Information about the Company's business strategies and identified business opportunities;
· The Company's intellectual property, insurance policies, and computer formats;
· Information which if disclosed might cause harm to the Company's business or advantage a competitor;
· Information about the Company's administrative procedures and business;
· The Company's know how including trade secrets, technical data and formulae, technical analysis, underwriting practises and models, computer programmes, research records, market surveys, market analysis, competitor information, slogans, technology information, sales techniques, designs, and copyright.

Protection of the Company's interests

The enclosed copy of a Post Employment Restraint Deed at Schedule 2 forms part of your Employment Agreement. Please read this carefully and seek advice if necessary before signing and returning it with your Employment Agreement. Your acceptance of this offer will not be valid unless you also execute the Schedule.

You acknowledge that:

during your employment you will:

· acquire significant information about the business of the Company including the names of employees, contractors, officers, agents, suppliers and clients with whom the Company does business;
· have the opportunity to forge personal links with employees, contractors, officers, agents, suppliers and clients;
· have the opportunity to learn and acquire trade secrets, business connections and other confidential information about the Company's business;
· disclosure of confidential information could materially harm the Company;
· the restrictive covenants contained in the Post Employment Restraint Deed are reasonable in scope and duration and reasonably necessary for the protection of the Company's goodwill and legitimate business interests, particularly in relation to the Company's core business activities;
· the remuneration and other benefits payable to you include consideration in respect of your obligations under the Post Employment Restraint Deed;
· the remedy of damages may be inadequate to protect the Company's interests and the Company is entitled to seek and obtain injunctive relief, or any other remedy, in any court; and
· in view of the importance of the obligations contained in this clause for the protection of the Company's proprietary interests, this clause will survive the termination of your employment with the Company in all circumstances including repudiation by the Company of the remainder of this agreement.
By accepting this offer and executing the Post Employment Restraint Deed, you represent to the Company that you have sought independent legal advice regarding the effect of the Post Employment Restraint Deed.
...
SCHEDULE 2 – Post Employment Restraint Deed

Date: 30/9/2008

By: Peter Hanna

In favour of:

OAMPS Insurance Brokers ABN 34005543920 of 176 Wellington Pde, East Melbourne (the **Company**)

Operative Clauses:

1. To reasonably protect the goodwill and the legitimate business interests of the Company, during the Restraint Period and within the Restraint Area (referred to below), you will not, without prior written consent of the Company, directly or indirectly:

(a) Entice or solicit, or assist another person to entice or solicit, an employee, contractor, officer, agent or supplier of the Company with whom you have had dealings prior to your employment ending, to cease to provide services to the Company;
(b) Canvass, solicit or deal with, or counsel, procure or assist another person to canvass, solicit or deal with any client of the Company with whom you have had dealings during the two year period prior to your employment ending.

2. **Restraint Period** means, from the date of termination of your employment:

(a) 15 months;
(b) 13 months;
(c) 12 months.

Restraint Area means:

(a) Australia;
(b) The State or Territory in which you are employed at the date of termination of your employment;
(c) The metropolitan area of the capital city in which you are employed at the date of termination of your employment.
prior written consent includes a documented list of Clients agreed and authorised in writing by the Company prior to the termination of your employment.

3. The covenants given by you in this clause will apply, and may be enforced against you, regardless of the reason(s) for the termination of your employment.

4. Each restraint contained in this Deed (resulting from any combination of the wording in clauses 1 and 2) constitutes a separate and independent provision, severable from the other restraints. If a court of competent jurisdiction finally decides any such restraint to be unenforceable or whole or in part, the enforceability of the remainder of that restraint and any other restraint will not be affected.

Executed as a Deed Poll"

4 After Mr Hanna left OAMPS, a dispute arose between the parties as to the enforcement of the restraint deed. A summons was filed on 28 June 2010; an application for interlocutory relief came before the primary judge on 1 July 2010, on which date undertakings were given to hold the position; a final hearing took place before the primary judge on 12 and 13 July 2010; and on 27 July 2010, the primary judge published reasons and ordered that short minutes be brought in reflecting

enforcement of the restraint covenant for 12 months throughout Australia: *OAMPS Insurance Brokers Ltd v Hanna* [2010] NSWSC 781. On 30 July 2010 the Court made orders conformable with the reasons of the primary judge as follows:

> "1. For the period up to and including 28 May 2011, without the prior written consent of the plaintiff, the defendant be restrained throughout Australia, from, directly or indirectly:
>
> (a) canvassing, soliciting, or dealing with, or counselling, procuring or assisting another person to canvass, solicit or deal with, any of the clients listed in annexure A to these orders;
>
> (b) soliciting, or counselling, procuring or assisting another person to solicit, any of the clients listed in annexure B to these orders;
>
> (c) enticing or soliciting, or assisting another person to entice or solicit, an employee, contractor, officer, agent or supplier of the plaintiff with whom the defendant had dealings prior to 28 May 2010 to cease providing those services to the plaintiff.
>
> 2. Subject to order 3, for the period up to and including 28 May 2011, the defendant be restrained from using or disclosing the following information about clients listed in annexures A and B to these orders:
>
> (i) renewal dates of any policy of insurance held by the clients;
>
> (ii) assets over which any policy of insurance is to be obtained; and
>
> (iii) the fees paid to the plaintiff by the clients in the period up to 28 May 2010.
>
> 3. Order 2 does not extend to information which is provided by the client directly to Strathearn Insurance Brokers without the involvement of the defendant.
>
> 4. The defendant pay the plaintiff's costs of these proceedings as agreed or assessed."

5 No complaint is made on appeal about orders 1(c), 2, and 3; orders 1(a), (b) and 4 were challenged on appeal. The lack of challenge to order 1(c) is not entirely consistent with all the arguments on appeal. No point, however, was made of that by OAMPS.

6 Five grounds of appeal were argued. First, the restraint deed was said to be void for uncertainty: see Notice of Appeal paras 5-8. (This would also affect order 1(c); but, as I said, order 1(c) was not opposed.) Secondly, the restraint deed was said to go beyond what was reasonably necessary to protect OAMPS' interests by the restriction on "dealing": see Notice of Appeal para 9. This ground of appeal was refined in argument to be limited to 17 clients in respect of whom, it was asserted, there should have been no dealing restriction imposed. The third to fifth grounds (see Notice of Appeal paras 10, 11 and 12 and 13, respectively) were challenges to a number of factual conclusions made by the primary judge relevant to the reasonableness of the restraint and a criticism of the test used by his Honour in assessing the reasonableness of the restraint.

Ground one: whether the restraint deed was void for uncertainty

7 The primary judge dealt with the argument as to uncertainty at [38]-[67] of his reasons. The primary judge noted that (as on appeal) Mr Hanna did not argue that the clause was uncertain because it did not have a clear English meaning. Rather, he dealt with the argument (repeated on appeal) that, as a so-called "cascading" restraint clause, it was uncertain because the provision contained no mechanism for the selection of which clause was to operate. Thus, it was said, the contracting party, could not know, from the terms of the contract, what the operative obligation was.

8 After a review of the authorities (*J.Q.A.T Pty Limited v Storm* [1987] 2 Qd R 162; *Austra Tanks Pty Limited v Running* [1982] 2 NSWLR 840; *Lloyd's Ships Holdings Pty Limited v Davros Pty Limited* [1987] FCA 70; 17 FCR 505; *Brendon Pty Limited v Russell* (1994) 11 WAR 280; *Schindler Lifts Australia Pty Limited v Debelak* [1989] FCA 311; 89 ALR 275; *Tyser Reinsurance Brokers Pty Limited v Cooper* [1998] NSWSC 689; *Hydron Pty Limited v Harous* [2005] SASC 176; *Sear v Invocare Australia Pty Limited* [2007] WASC 30; (2007) ATPR 42-149; *Extraman (NT) Pty Limited v Blenkinship* [2008] NTSC 31; 23 NTLR 77; *Run Corp Ltd v McGrath Ltd* [2007] FCA 1669; (2007) ATPR 42-198; and *Northern Tablelands Insurance Brokers Pty Limited v Howell* [2009] NSWSC 426; 184 1R 307) the primary judge concluded that the restraint deed was not uncertain.

9 It is unnecessary to recite how his Honour dealt with the various judicial opinions in these cases. It suffices to dispose of this aspect of the appeal to say that I agree with the primary judge's conclusion that the restraint deed was not void for uncertainty and that I generally agree with his Honour's reasons for that conclusion, and to set out briefly my reasons in respect of the arguments put on appeal (which reflected the arguments put to the primary judge).

10 Two principal reasons were propounded for the asserted conclusion as to uncertainty. First, on its proper construction the restraint deed was said to contain a single covenant which contained mutually inconsistent obligations. Secondly, even if the restraint deed contained more than one covenant it was uncertain because it made no provision or mechanism to determine which one or more of the several restraints applied and in what order.

11 The first argument relied heavily on the existence of the definite article ("the") before each of the phrases "Restraint Period" and "Restraint Area". It ignored or failed to give adequate weight, however, to the terms and effect of cl 4. Clause 4 made clear that the various periods and areas in cl 2 were part of separate and independent provisions. Thus there were nine restraints, from the widest (15 months in Australia) to the narrowest (12 months, in Mr Hanna's case, in the metropolitan area of Sydney). All were binding. Taken as individual covenants, all capable of being understood by the use of clear words and all being capable of being complied with without breaching any of the others, the one covenant argument must fail.

12 The second argument has implicit in it a proposition that there is a legal requirement for a hierarchy of the clauses and a mechanism for their order of operation. Reduced to its essential element, there was said to be uncertainty in more than one clause covering by different terms the same ground of a party's obligation. I cannot agree with the width of these propositions. It may be that if multiple obligations on the same subject matter so conflict that a contracting party cannot know what it is to do, such clause, or the contract in which it is found, is uncertain and void. For instance, a clause that says that the party must perform by doing only act X and another clause that says that the party must perform by doing act Y (which is inconsistent with X) may lead to a conclusion of uncertainty. No such difficulty arises here. Compliance with any relevant clause will not lead to breach of any other clause. All bind, but at one level of practicality the most relevant is the widest. Nevertheless, all are binding. Neither their operation nor any principle of law concerned

with certainty of contract requires a mechanism or hierarchy of order of operation.

13 This deed has nine several clauses, each clearly expressed. It may be that a complex and difficult clause with multiple permutations and combinations would be so impenetrable as to lack coherent meaning and be uncertain. That is not the case here.

14 For these reasons I do not accept the second argument.

15 Before examining whether any of the cases relied upon alter these conclusions, it is necessary to say something about an argument raised in dialogue in the appeal and which the appellant relied upon. The point was not the subject of a ground of appeal or of specific written submission. The respondent did not, however, object to the reliance by the appellant upon it. The argument was that even if the restraint deed was not void for uncertainty, provisions amounting to repetitive and overlapping restraints of ever widening reach and subject matter were against public policy for the purposes of the *Restraints of Trade Act 1976* (NSW), s 4(1).

16 The argument was not fully developed, but its essence was that clauses between employer and employee should exhibit a reasonable attempt to identify a clear and agreed reach for any post-employment constraint. Clauses which seek to establish a multi-layered body of restraints that are complex (even if certain) are against public policy.

17 I would reserve any concluded views about this as a matter of principle to an occasion where the matter was fully argued. Wootten J touched on the argument in *Austra Tanks v Running* at 843F-844A and 846B-C. Assuming, however, complexity and repetition, if unreasonable, are against public policy, this restraint deed is not capable of being so characterised. The operation of the clauses is tolerably clear. They are apparently an attempt to ensure that some post-contractual restraint would avail OAMPS within the temporal and geographic ranges identified. Given the common law rules and, in particular, those concerning severance and the so-called "blue-pencil" test, it is understandable why commercial parties seek to employ multiple severable clauses. The restraint deed is not against public policy by reason of the multiple and several operation of cll 2 and 4.

18 I turn now to the cases relied upon by the appellant. For the sake of brevity, I do not propose to analyse each case and its facts in detail. Rather, I will express my conclusions as to the relevance of each in short form.

19 In *Austra Tanks v Running*, Wootten J found a clause that purported to be one clause to be uncertain. The content of the one clause depended upon whether a court found any one or more possible elements enforceable. There were a large number of possible elements to one clause, the binding nature of which was unclear, depending as it did upon the view of a court in any proceeding. As Wootten J said at 843: "... the contract seeks to define the obligation through a series of inquiries as to what is enforceable." There was only one covenant and there was uncertainty as to its content. It was, as Wootten J said at 845, a covenant in substance like that in *Davies v Davies* (1887) 36 Ch D 359: a covenant "so far as the law allows". For these reasons, the case is distinguishable from the present facts. It provides no principle upon which to reach a conclusion about the restraint deed here different to that which I have come.

20 In *Tyser Reinsurance Brokers v Cooper*, Young J (as his Honour then was) concluded that a restraint clause was void for uncertainty because of the absence of a crucial definition. By way of *obiter dicta*, Young J said in respect of a clause that had multiple restraint periods that there were

"very real difficulties" with such a clause, partly because it was "not a reasonable way of letting an employee know what are the requirements that bind him or her" and partly because of difficulties in the event of an appeal. His Honour's remarks were not directed at the question of certainty. They may go to the possible public policy question to which I have adverted. The case provides no principle contrary to the conclusion that I have reached about the restraint deed.

21 In *Northern Tablelands Insurance Brokers v Howell*, Barrett J found a clause with multiple periods of restraint void for uncertainty. The ratio of the decision was that the clause was **one** covenant with the various periods. There was therefore no clarity as to what the (single) obligation meant. Barrett J then dealt with the clause on the hypothesis that it imposed "several alternative restraints". He asked himself the question (see 315 [47]): "How then does one make the selection among them?" This was in a context in which one clause provided that if any part or provision of the clause was held to be illegal or unenforceable it was severable, and the remaining provisions shall stand. His Honour said the following about this (at [48]):

> "[48] ... Assume that the part or provision concerning 36 months is the only part or provision held to be illegal or unenforceable. Which of the 12 months and the 24 months provisions then stands? The answer must be that both stand, with the result that there is still no available means of determining which should be observed and enforced."

He continued at [49]-[51]:

> "[49] This difficulty stemming from clause 9.7 is of the same kind as was referred to by Young J in *Tyser Insurance Brokers Pty Ltd v Cooper* (unreported, NSWSC, Young J, 7 December 1998):
>
> > 'The restraint period should not differ depending on what a court should hold. First, it is not a reasonable way of letting an employee know what are the requirements that bind him or her; secondly, there is great difficulty if there is an appeal against the holding, both pending the appeal and, perhaps, afterwards.
> >
> > As Mr Robinson pointed out in his submission, what happens if within one year the period is held to be invalid? There seems to be no mechanism for substituting a fresh period.'
>
> [50] This part of the case may be summed up in words used by Spender J in *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd* (1987) 17 FCR 505 at 520:
>
> > '[A] threshold question in determining the certainty of a restraint of trade clause of the kind now before me is whether the clause contemplates a single covenant to operate from the numerous combinations of conduct, time and area which are generated. If the clause contemplates a single covenant, then the covenant must provide a means by which to choose which of the combinations is to apply; otherwise the clause is void for uncertainty.'
>
> [51] In the present case, there is a meaningless cumulation of three periods. It is not stated that any one of the three may alone stand and, if so, how the operative component is to be chosen from among the three."

22 These passages, and in particular the reliance upon what Spender J said in *Lloyd's Ships,* reveal that his Honour's reasoning was predicated upon there being one covenant and there being no statement or mechanism for knowing what the obligation is. Here, on the other hand, all the covenants are binding, severally and independently. This distinction of the reasoning of Barrett J is made clear by the use his Honour made of the reasons of Spender J in *Lloyd's Ships*. Immediately after the passage cited by Barrett J concerning a single covenant, Spender J said the following:

> "[54] ... A clause which contemplates a single covenant, being the widest restraint that is enforceable, will be uncertain 'because in the absence of any statement as to the priority of application of the variables, it is not possible to say which covenant is widest' (*Austra Tanks* (supra) at 845). Such a clause may be open to separate public policy objection that the parties have left the Court to fix the measure of the restraint.
>
> [55] If, however, the clause contemplates all of the combinations applying with severence of those found to be an unreasonable restraint of trade, then no uncertainty exists. The clauses operate cumulatively, with any overlap between the obligations thereby imposed not being regarded as an inconsistency of the kind discussed by Bowen LJ in *Davies v Davies* (supra) at 393.
>
> [56] In this case, cl 39(a)(i) expressly states that the clause is to have effect as if it were several separate covenants consisting of the combinations. The intention of the parties was for all of the combinations to apply, subject to the severance of any of them which become invalid or unenforceable for any reason. The covenants impose consistent and cumulative obligations, although some of these obligations overlap. For the reasons discussed by the Full Court of Queensland in *J.Q.A.T. v Storm*, the obligations cannot be said to be uncertain."

23 The use by Barrett J of the passage from Spender J's judgment in *Lloyd's Ships* dealing with the invalidity of a single covenant containing alternatives (in contradiction to Spender J's views as to the validity of multiple binding covenants) makes clear that his Honour was treating the clause in *Northern Tablelands* as a single covenant.

24 The relevant covenants in *J.Q.A.T.* were set out by the primary judge at [45] of his reasons. I do not repeat them. There were three prohibited activities, three periods and two geographical areas. The clause described the permutations and combinations and stated that each was a binding clause. The Full Court of the Queensland Supreme Court rejected the contention that the clause was void for uncertainty. The primary judge recited the relevant passages from the reasons of Connolly J (at 164) and Ambrose J (at 167-169) at [47] and [48] of his reasons. I do not repeat those passages. Reference should also be made to what was said by Connolly J at 164-165 and by Williams J at 166-167. Each of those judges came to the view that as separately binding clauses that overlapped with otherwise clear terms, the provisions were not uncertain in their definition of the legal obligations of the parties.

25 It was submitted that *J.Q.A.T.* was plainly wrong. I disagree. It is not plainly wrong.

26 The reasoning in *J.Q.A.T.* has been followed or approved in *Lloyd's Ships, Hydron v Harous, Sear v Invocare Australia, Extraman v Blenkinship* and in *Run Corp v McGrath.*

27 In *Schindler Lifts v Debelak*, Pincus J expressed doubts about *J.Q.A.T.* at 306, saying:

> "I do not, with respect, find that explanation of the *Austra Tanks'* case entirely convincing. If it is not permissible to do what was done by the contracting parties in *Austra Tanks,* then I should have thought the covenant here to be invalid. I do not well understand how it could be saved by holding that it contemplates 'a number of separate clauses of restraint'. There appears to be no difference of substance between the parties' expressed intention in *Austra Tanks* and that used in *Addwood Products* [*Pty Ltd v Frost* (Supreme Court of NSW, 11 July 1986, unreported)] of such a kind as to justify treating the former but not the latter as constituting a single covenant."

28 With the utmost respect, I cannot agree. If, on its true construction, a covenant tells a party that there is just one thing he or she must not do, but then gives three alternatives and no mechanism for determining which of the three applies, then that covenant may be uncertain. If there is no inconsistency in what is required (albeit there may be accumulation and repetition) as explained in *J.Q.A.T.*, there is no uncertainty. The difference is one of form in drafting. Nevertheless, form in drafting is the basis of the creation of the relevant legal obligations.

29 In *Brendon v Russell*, Ipp J also doubted the reasoning in *J.Q.A.T.* I do not agree. Ipp J dealt with a clause different to that here. In a clause providing for a range of restraints he found the widest and narrowest sufficiently certain and the intermediate restraints uncertain because they were in the alternative and dependent upon the ruling of a court by reference to the phrases "maximum enforceable area" and "maximum enforceable period."

30 It was submitted also that the existence of the *Restraints of Trade Act* in New South Wales made the reasoning of *J.Q.A.T.* as a Queensland case distinguishable. I disagree. The case concerned uncertainty at common law. The subject matter dealt with by the judges in *J.Q.A.T.* was the same as that which we are required to analyse.

Ground 2: Reasonableness and "dealing"

31 At [71] of his reasons, the primary judge stated the following:

> "[71] Correctly, the defendant did not in final submissions contend that either the activities to be restrained under cl 1(b) or the area was unreasonable. The defendant was a human face of the business. He had strong connections with, and the ability to influence the actions of, clients with whom he dealt, as his handwritten file notes disclose and subsequent events have proved. Those dealings also displace propositions put by the defendant that clients of OAMPS rarely change brokers and that the defendant's influence was minimised by the fact that his role was supervisory, or in some cases, joint."

32 The respondent accepts that the primary judge was wrong to say that the defendant did not contend that the activities in cl 1(b) were not unreasonable. The appellant did submit below that the restraint on dealing was unreasonable: see [5.39]-[5.48] in the written submissions below.

33 This argument was refined on appeal. First, it was common ground that the reasonableness and validity of the restraint clause should be assessed at the time of entry into the contract. See generally *Koops Martin v Dean Reeves* [2006] NSWSC 449 at [53]; and J D Heydon, *The Restraint of Trade Doctrine* (2008 LexisNexis Butterworths 3rd Ed) pp 45-49. (It is unnecessary therefore to consider the proper construction of the *Restraints of Trade Act,* s 4 and in particular s 4(1) in the light of the content of s 4(3).)

34 The appellant accepted in argument on appeal that in the light of the limitation of cl 1(b) to clients with whom Mr Hanna had had dealings prior to his employment ending the clause was in that respect reasonable. That concession was correct. It was not necessary for the clause to limit dealing only to clients with whom Mr Hanna had a strong connection. The addition of "dealing" to "soliciting" has the legitimate purpose of making unnecessary the fine distinctions as to what is soliciting and what is mere dealing, and removing the temptation for subterfuge and pretence: see Heydon *op cit* at 163-164.

35 What was pressed on appeal, however, was an argument that the order of the Court should not as a matter of discretion have extended to 17 clients because Mr Hanna was not dealing with them at the time of his departure and the evidence adduced was inadequate upon which to conclude that a restraint on dealing was justified.

36 I would reject this argument. Fifteen of the 17 clients were corporate entities in the Swire group of companies. There was clear evidence of the strength of connection between Mr Rothery (a senior officer in the Swire Group) and Mr Hanna. Mr Rothery clearly thought highly of Mr Hanna. The evidence amply supported the primary judge's conclusions in [71] of his reasons about strength of connection.

37 Two clients which were not part of the Swire Group were included in the restriction on dealing. Mr Hanna had dealt with them, but did not do so at the time of leaving. There was no attempt to demonstrate, other than by general evidence, that Mr Hanna had a strong connection with them. Nevertheless, I would not alter the order because of this. He had dealt with them. The evidence was sufficient to found a conclusion that Mr Hanna was a highly competent and deeply experienced broker likely to create a real connection with clients if he dealt with them by reason of those attributes.

Ground 3: The findings relevant to reasonableness

38 It was argued that the judge was wrong to describe Mr Hanna as "a human face" of OAMPS and that this conclusion ignored other evidence of the participation at a direct level with the client of account managers and of Mr Hanna's role in supervision and general overall control.

39 I disagree. His Honour used an expression. It was tolerably apt. The evidence disclosed was sufficient upon which to conclude that as one member of a team Mr Hanna had a strong connection with clients with whom he dealt, no doubt, competently.

40 This ground of appeal fails.

Ground 4: The wrong test to judge connection

41 The approach of the primary judge to the reasonable protection of the connection of the clients to OAMPS was to identify a period (12 months) which would substantially ensure that OAMPS was able to undertake renewal of all the insurance policies of the relevant clients, without the competition of Mr Hanna in his new employment. At [81]-[83] the primary judge set out a description of two "tests" used by Brereton J in *Koops* and by McDougall J in *Stacks Taree v Marshall [No 2]* [2010] NSWSC 77 as follows:

> "[81] Support for the approach taken by OAMPS is to be found, amongst others, in *Koops*. At par 88 Brereton J held:
>
> > 'Generally, the test of reasonableness for the duration of such a restraint is what is a reasonable time during which the employer is entitled to be protected against solicitation; that in turn depends on how long it would take a reasonably competent replacement employee to show his or her effectiveness and establish a rapport with customers [*Stenhouse*; *DalySmith Corporation (Australia) Pty Limited v Cray Personnel Pty Limited* (NSWSC, Young J, 14 April 1997, unreported)]. A related albeit subsidiary consideration is how long might the hold of the former employee over the clientele be expected to last before weakening.'
>
> [82] On the other hand, there is support for the defendant's submission in the decision of McDougall J in *Stacks Taree [No 2]*. At par 66 – par 72 his Honour said:
>
> > 'The last question of principle concerns the approach to be taken in assessing the reasonableness of the duration of a restraint (either on solicitation or on competition). That question needs consideration because the submissions, and much of the evidence, for Stacks Taree addressed the length of time that it would take to introduce Mr Phoon to Mr Tim Stack's clients and to promote him to the local business community, in the same way that Mr Marshall had been introduced and promoted. Mr Moses submitted that this was not the correct approach; and that the correct approach required consideration of the time that it would take to sever the relationship built up between Mr Marshall and the clients for whom he had worked.
> >
> > For present purposes, the starting point may be taken to be the decision of Rath J in *IRAF Pty Ltd v Graham* [1982] 1 NSWLR 419. That case concerned a restraint in a contract of sale of a hairdressing salon. By that restraint, the vendor and his associates agreed that they would not for a period of three years from completion, and within a radius from one kilometre from the location of the business sold, be engaged directly or indirectly in the business of a hairdresser.
> >
> > Rath J held that some aspects of the restraint were too wide, but that they could be read down by reference to s 4(3) of the *Restraints of Trade Act*.

> His Honour dealt with the duration of the restraint at 428-429. At 429, he said that the most important consideration, in considering the reasonableness of the duration of the restraint, was "the time required for severing the relationship between the defendant [vendor] and those clients who would patronize the business after its sale". There was, as his Honour said, "necessarily a large element of conjecture involved here". It followed, his Honour said, that "considerable weight should attach to the period the parties themselves have selected".
>
> His Honour's approach of considering the time taken to sever the covenantor's connection with the customers or clients in question rather than the time for the covenantee to build up (or rebuild) a connection, was followed by the Full Court of the Supreme Court of South Australia in *NE Perry Pty Ltd v Judge* (2002) 84 SASR 86. See Doyle CJ at 91 [28] – [30], Bleby J at 96 [63] and Besanko J at 103 [101] – [104]. Besanko J explained the reason for this approach at 103 [100], by reference to the judgment of Kitto J in *Lindner* at 654. Besanko J said that the interest being protected was the purchaser's interest in its business connection: preventing that connection from being affected by the personal knowledge and influence over the customers of the business which the vendor might have. (In fact, and of more relevance to this case, Kitto J put the matter in terms of a covenant given by an employee, and referred to knowledge and influence gained by the employee in the course of employment.)
>
> Again, in *Cream v Bushcolt Pty Ltd* [2004] WASCA 82, the Full Court of the Supreme Court of Western Australia observed "that the most important consideration is the time required for severing the relationship between the vendor and those clients who would patronise the business after the sale". See Malcolm CJ (with whom Miller and McKechnie JJ agreed) at [53].
>
> Of course, as Doyle CJ pointed out in *Perry* at 91 [31], there may be little practical difference between the two approaches. Nonetheless, his Honour said, "it is safer to focus on the period of time reasonably required to break the connection... rather than the period of time within which there would be an opportunity for [the employee] to establish a new connection.'

[83] After referring to the passage in Brereton J's judgment in *Koops* referred to above, his Honour continued at par 74:

> 'It does not appear that his Honour was referred to the decision of Rath J in *IRAF*, or to the Full Court decisions that I have cited. In circumstances where there is some conflict in the approach taken by two judges at first instance in this Court (Rath J in *IRAF* and Brereton J in *Koops*), I think that it is open to me to consider the matter for myself. I prefer the

> approach of Rath J in *IRAF*, and I take into account that it has commanded the support of two intermediate appellate courts. Further, for the reasons given by Besanko J in *Perry* (see at [70] above), I think that the approach taken by Rath J and by the Full Courts of the Supreme Courts of South Australia and Western Australia accords with the principle on which restraints on trade are enforced.'"

42 The appellant said that the primary judge erred by not adopting the test in *Stacks* and by not concluding that there was inadequate evidence led to form any conclusion as to how long it would take for the connection to lapse. Thus, it was said, OAMPS had not discharged the burden of proof.

43 I disagree. There is no legally required test in these circumstances. The use of one test or another depends on the facts and the evaluation of the approach that is reasonable. The judge is required to evaluate the evidence about connection and adopt an appropriate approach to assessing what is required to protect reasonably the connection of the former employer. The proper approach was described in *Stenhouse Australia Ltd v Phillips* [1974] AC 391 at 400 set out by Hodgson JA in *Miles v Genesys Wealth Advisers Ltd* [2009] NSWCA 25 at [36]-[37], as follows:

> "[36] In my opinion, there is no precise rule on the basis of which the period for which an employer is legitimately entitled to protection can be determined. I would not endorse the statement by Young J in *DalySmith* [*Corporation (Aust) Pty Ltd v Cray Personnel Pty Ltd* (Supreme Court of NSW, Young J, 14 April 1997, unreported)] at 13 that 'a restraint that enures after the time taken for a reasonably competent new employee to master the job and be able to demonstrate to the customer that he or she is effective and efficient will be too long'.
>
> [37] I would respectfully adopt the general statement of principle by the Privy Council in *Stenhouse* at 400:
>
> > The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if this has been acquired in the service of his employer: it is this freedom to use to the full a man's improving ability and talents which lies at the root of the policy of the law regarding this type of restraint. Leaving aside the case of misuse of trade secrets or confidential information (which is separately dealt with by clause 3 of the agreement and which does not arise here), the employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee may have contributed to its creation. For while it may be true that an employee is entitled – and is to be encouraged – to build up his own qualities of skill and experience, it is equally his duty to develop and improve his employer's business for the benefit of his employer. These two obligations interlock

> during his employment: after its termination they diverge and mark the boundary between what the employee may take with him and what he may legitimately be asked to leave behind to his employers."

44 Hodgson JA also said at [41] in that case, that minds may differ about what is a reasonable protection and about the balance between the connection that properly belongs to the former employer and the right to practise a trade or profession of the former employee.

45 Regard should also be had to what the Privy Council said in *Stenhouse* at 402:

> "... The question is not how long the employee could be expected to enjoy, by virtue of his employment a competitive edge over others seeking the clients' business. It is, rather, what is a reasonable time during which the employer is entitled to protection against solicitation of clients with whom the employee had contact and influence during employment and who were not bound to the employer by contract or by stability of association. This question ... their Lordships do not consider can advantageously form the subject of direct evidence. It is for the judge, after informing himself as fully as he can of the facts and circumstances relating to the employer's business, the nature of the employer's interest to be protected, and the likely effect on this of solicitation, to decide whether the contractual period is reasonable or not. An opinion as to the reasonableness of elements of it, particularly of the time during which it is to run, can seldom be precise, and can only be formed on a broad and common sense view."

Ground 5: The asserted error in choosing the 12 month period

46 Once one accepts, as on the evidence the primary judge was entitled to do, that renewal was a critical time for each client, the use of the 12 months is difficult to criticise.

47 It can be accepted that there was the opportunity for introduction of Mr Hanna's replacement to clients well within the 12 months, but that does not gainsay the reasonableness of the protection of one renewal for each client to show the skill and competence of the firm to maintain the connection.

48 The evidence was sufficient to show the importance of renewal and the three month period before renewal. The position was adequately summarised by the primary judge at [76], [78], [91]-[99], as follows:

> [76] There was no issue that clients' insurance programs are usually 12 months and that renewal programs almost invariably commence three months before anticipated renewal. The critical point of time is the date of renewal. If, during the period leading up to renewal another broker is appointed, it is almost inevitable that the revenue will be lost to OAMPS. A history of dealing with the client is undoubtedly an important factor in the further retention of the broker.
>
> ...
>
> [78] OAMPS submitted that given that every policy will be renewable within 12 months from the defendant's departure, 15 months restraint is

the minimum period to ensure OAMPS an untrammelled opportunity of not less than three months across the portfolio to protect its customer connection by establishing a rapport with, and demonstrating competence to, the clients.

...

[91] The Restraint Deed is aimed at protecting OAMPS' interest in its customer connections by preventing the defendant from using his personal knowledge and influence over the clients built up during the course of his employment with OAMPS. The question is whether, on the whole of the evidence, OAMPS has proved circumstances from which reasonableness can be inferred.

[92] As earlier mentioned, the critical point in time for OAMPS in securing its business connection (or for that matter for bringing about severance of the defendant's relationship with the client) is the policy renewal date. The renewal dates of the portfolio are spread throughout the year.

[93] At a minimum therefore, protection for 12 months is reasonable. This is the minimum necessary to give OAMPS one opportunity to cement its connection or for the defendant's connection to be severed across the portfolio.

[94] Twelve months also ensures an untrammelled opportunity during the crucial three month renewal period in respect of policies renewed during the nine months commencing three months after the defendant's departure.

[95] Twelve months does not, however, give OAMPS a full three month period in respect of policies that expire less than three months after the defendant's departure.

[96] There is some force in OAMPS' submission, which was persuasively articulated, that an additional three months is required.

[97] On this approach, however, OAMPS would get two opportunities (although the first would be less than three months) to retain the client in respect of renewal of policies in the portfolio which expire less than three months after the defendant's departure. OAMPS submitted that the first opportunity should be disregarded because the defendant would have had some involvement before his departure in relation to the renewal and it may be inferred that his involvement would have contributed to the retention of the business, so that OAMPS in its own right would have had insufficient opportunity to establish rapport with and demonstrate competence to the client.

[98] However, to be balanced against this is that OAMPS will have had some opportunity in respect of policies renewed during the first three months and it will have the remainder of the year (including in most cases some part of the next renewal period) to secure its customer connection (or

> sever the defendant's). If OAMPS has retained the client in those first three months it will have gone at least some of the way (if not the entire distance) to severing the defendant's connection with that client. There is also nothing to prevent OAMPS from making efforts outside the usual three month renewal period, although that is the period when the client is most likely to determine who it will retain. It is then when clients focus on renewal.
>
> [99] The choice between 15 months and 12 months as the minimum period reasonably necessary to protect OAMPS' legitimate business interest is finely balanced. In all the circumstances however, I think the latter equates to the minimum period reasonably necessary to protect OAMPS' legitimate business interest and is the period in respect of which the defendant should be restrained. It is also the minimum period which the parties agreed under the Restraint Deed."

49 Though significant parts of the evidence led by OAMPS were general in terms, the totality of the evidence including the material that revealed the high opinion of Mr Hanna by his commercial clients was adequate to found the primary judge's findings.

Conclusion

50 For the above reasons, I would dismiss the appeal with costs.

51 HODGSON JA: I agree with Allsop P.

52 HANDLEY AJA: I agree with Allsop P.

****

Amendments

20/10/2010 - Typographical error - Paragraph(s) Paragraph heading above [38]

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