



# Précis Paper

## Restraints of Trade

Abstract – Numerous myths and issues surrounding restraints of trade including enforceability, seeking relief, confidentiality, injunctions, and case investigation information, are analysed with reference to leading restraints of trade cases, such as *Isaac v Dargan Financial Pty Ltd* (2018) 98 NSWLR 343; [2018] NSWCA 163.

### Discussion Includes

- Myth that restraints of trade are unenforceable
- Reoccurring issues
- Seeking Relief
- The Court's contemporary view of restraints of trade
- Confidentiality
- Injunctions
- Case investigation information

# Précis Paper

## Restraints of Trade

1. In this edition of BenchTV, Shane Prince SC (Barrister), and Andrew Wilson (Barrister), discuss the numerous myths and issues surrounding the topic of restraints of trade. Among the topics covered concerning leading cases is the myth that restraints of trade are unenforceable, reoccurring issues, seeking relief, confidentiality, and injunctions.

### Myth of unenforceability

2. People often have a preconceived notion that restraints of trade are not enforceable, which is also the view of some highly experienced solicitors. However, the myth that restraints of trade are unenforceable is far from the truth.
3. Andrew states that regarding the myth that the restraints of trade are unenforceable, he researched the cases that have been before the New South Wales Supreme Court during the previous five years. The findings were that in the circumstances where an applicant is pursuing the enforcement of a restraint of trade, the successful applicants clearly exceeded the unsuccessful claims.
4. Successful restraint of trade cases in which the applicant receives some type of relief over a defendant attempting to resist such an application, the applicant prevails at a ratio of more than two to one, or 67%.

### Reoccurring issues

5. There can be, at times, issues arising from the extent to which a client wants a restraint of trade to extend. This issue occurs as the client wants to have a very stringent set of protections written into their contracts. However, very harsh restraints of trade can be counterproductive, and so they should be drafted with protecting the genuine interest of business in mind.
6. The *Restraints of Trade Act 1974* (NSW) s 4(1) enables the Court to shape relief by reference to the specific breach that's occurring at the time rather than to the abundance of breaches that the restraint itself creates.

### Seeking Relief

7. Although moving quickly on a potential breach or a restraint of trade is imperative, evidence must be sufficiently prepared, as quite often a crucial measure to implement is to recruit a forensic computer expert to filter through internal computer systems to gather as much pertinent information as possible. From gathering such electronic evidence, one can establish whether an employee's fiduciary obligations have been breached.

### Court's contemporary view

8. Prior to *Nordenfelt*,<sup>1</sup> at least in England, restraints of trade were not treated with as much coherence. However, in *Nordenfelt* the process of analysis and justification of restraints was acknowledged and administered and has since remained across most Commonwealth jurisdictions.
9. However, in most American jurisdictions, restraints of trade are non-existent. Nevertheless, so too is the requirement of reasonable notice in contracts of employment for termination. Therefore, it is hard for some American clients to fathom the idea of equity enforcing restraints of trade.
10. *Isaac v Dargan*,<sup>2</sup> the leading case on restraints of trade, set out the principles quite clearly. Restraints of trade at common law are void and contrary to public policy unless they are justified by the case's special circumstances. A restraint may be implemented and enforced if it is reasonably necessary for the protection of the concerned parties, coinciding with being reasonable in the public's interests.<sup>3</sup>
11. In New South Wales, *Restraints of Trade Act 1976* (NSW) s 4 sets out to which extent a restraint of trade will be valid.

### Confidentiality

12. In *DXC Connect*,<sup>4</sup> Black J observes that such information must be accurately defined for confidential information to be protected. Generally, it comes down to specific information that emerges before proceedings or concurrent to the proceedings themselves.
13. Another matter to consider in preparing evidence in a case involving misuse of confidential information is ensuring that a claim to confidentiality is maintained over the evidence in court. In *Isaac v Dargan*,<sup>5</sup> material that was tendered and read out in open Court was no longer confidential.
14. Thus, to protect this type of sensitive information, it needs to be the subject of an application under a court suppression order.<sup>6</sup>

### Injunctions

15. Ex parte injunctions have become less common. The majority of the time, there is an ex parte order for short service, which allows the case to return within a short period. Following this, unless there are undertakings, the application for injunctive relief will be listed for hearing.

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<sup>1</sup> *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.

<sup>2</sup> *Isaac v Dargan Financial Pty Ltd* (2018) 98 NSWLR 343; [2018] NSWCA 163 ('*Isaac v Dargan*').

<sup>3</sup> *Ibid*, [58]-[59] (Gleeson JA).

<sup>4</sup> *DXC Connect Pty Ltd v Deibe & Ors* [2017] NSWSC 1159.

<sup>5</sup> *Isaac v Dargan* (n 3).

<sup>6</sup> *Court Suppression and Non-publication Order Act 2010* (NSW).

16. However, consideration must be given as to whether injunctive relief is necessary. If the clients have already left and are not likely to come back, it may be in the employer's interests to permit the employees to continue servicing those clients and seek an account of profits for a breach of fiduciary duty or to seek damages.

#### Case investigation information

17. Case investigations are an integral part of building a case, and COVID-19 has presented some abnormal circumstances where people are working from home. In the home context, people are doing things that would typically cause a red flag but that have a perfectly legitimate reason. Thus, each case needs to be pressure tested.
18. A key element of pressure testing a case is to gauge how many clients have been lost, and further, how many more clients are likely to leave. Once this is established, it often becomes clear that the client base has not been damaged to the extent of the initial estimation.
19. Particularly in New South Wales, a focus point is to try and shape orders as narrowly as possible so that they become as closely aligned to the legitimate interests of the business as possible.

## **BIOGRAPHY**

### Shane Prince SC

Barrister, State Chambers, Sydney

Shane practices nationally with extensive experience in both trial and appellate matters. He undertakes a diverse range of matters and maintains a leading practice in each of the specialty areas of employment/industrial law and public law. Shane has appeared in 70 reported decisions (some of these cases have been cited in excess of 600 cases); and has appeared as lead counsel in the High Court in excess of 40 occasions.

### Andrew Wilson

Barrister, 10th Floor St James Hall Chambers, Sydney

Andrew was called to the Bar in May 2020. He practices civil and criminal law, and accepts briefs in a wide range of areas. Andrew has advised and represented companies, government entities, insolvency practitioners, not for profit organisations, company directors, trade union members and private clients. Prior to coming to the bar Andrew lead the commercial litigation practice of a major regional firm.

## **BIBLIOGRAPHY**

### Cases

*Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* [2018] HCA 43  
*Capercorp Pty Limited v Brasam Pty Limited as trustee for Brasam Investment Trust* [2017] NSWSC 608  
*Devine Real Estate Concord Pty Ltd v Agha* [2018] NSWSC 556  
*DXC Connect Pty Ltd v Deibe & Ors* [2017] NSWSC 1159  
*Employsure Pty Ltd v McMurchy* [2021] NSWSC 139  
*Grace Worldwide (Australia) Pty Limited (ACN 070 345 845) v Steve Alves* [2017] NSWSC 1296  
*Idameneo (No 123) Pty Ltd v Dr Teresa Angel-Honnibal* [2002] NSWSC 1214  
*Isaac v Dargan Financial Pty Ltd* (2018) 98 NSWLR 343; [2018] NSWCA 163  
*Lumley v Wagner* (1852) 42 ER 687  
*Mitchel v Reynolds* (1711) 1 PWms 181  
*Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535  
*Woolworths Limited v Mark Konrad Olson and Anor* [2004] NSWSC 849

### Legislation

*Court Suppression and Non-publication Order Act* 2010 (NSW)  
*Restraints of Trade Act* 1976 (NSW) s 4(1)