SUPREME COURT OF QUEENSLAND

CITATION:	*AECI Australia Pty Ltd v Convey* [2020] QSC 207
PARTIES:	**AECI AUSTRALIA PTY LTD** (applicant) **v** **NIGEL CONVEY** (first respondent) **INCITEC PIVOT LTD** (second respondent)
FILE NO/S:	BS 6089 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	10 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 July 2020
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. The application is dismissed.** **2. The parties are directed to file and serve written submissions on the question of the costs order which should be made within 14 days, and that question will be determined on the papers.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – GENERALLY – where the applicant alleges that non-compete and non-solicitation clauses are binding on and enforceable against a former senior executive employee – where the applicant seeks interlocutory relief to prevent the employee from taking up employment with the second respondent – whether the applicant has shown a prima facie case that the restraints are reasonable and therefore valid and enforceable, and that the employee threatens to breach the restraints – whether the balance of convenience favours the grant of injunctive relief *Amalgamated Pest Control Pty Ltd v SM & SE Gillece Pty Ltd* [2016] QCA 260, cited *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; [2006] HCA 46, considered *Daebo Shipping Co Ltd v The Ship Go Star* (2012) 207 FCR 220; [2012] FCAFC 156, considered *Just Group Ltd v Peck* (2016) 344 ALR 162; [2016] VSCA 334, applied *Koops Martin Financial Services Pty Ltd v Reeves* [2006] NSWSC 449, considered

OBG Ltd v Allan [2008] 1 AC 1; [2007] UKHL 21, cited

COUNSEL: I M Neil SC for the applicant
A Glynn QC for the first respondent
H Blattman for the second respondent

SOLICITORS: J H Law for the applicant
Mills Oakley for the first respondent
Herbert Smith Freehills for the second respondent

Introduction

[1] The applicant (**AECI**) had employed the first respondent (**the Employee**) in senior managerial positions since 2014.

[2] On 13 March 2020, the Employee resigned to take up employment with the second respondent (**IPL**). He communicated the resignation orally and by email, the latter communication advising that he would be happy to work with AECI as to a final termination date.

[3] The Employee's employment agreement with AECI required that he give three months' notice of termination. On 18 March 2020, AECI by its solicitors advised the Employee that it insisted on that period of notice and that he was to remain an employee until 12 June 2020. However, amongst other things, he was required not to attend work during that period, not to represent AECI in any way, and not to contact any actual or prospective customers. In effect, he was placed on "gardening leave".

[4] The Employee's new employment with IPL is to commence on 13 July 2020.

[5] AECI contends that the new employment will contravene restraints which the Employee had accepted in his employment agreement. By originating application filed 8 June 2020, it seeks to enforce those constraints against the Employee and IPL by obtaining declaratory and injunctive relief. By an interlocutory application filed on 8 June 2020, AECI sought injunctive relief which would operate until the trial of the originating application, or earlier order.

[6] The interlocutory injunction application as filed was returnable on 11 June 2020, the day before the Employee's employment would terminate. By consent order on that day, Bowskill J adjourned the application to a two-hour hearing on the applications list on 2 July 2020 and made ancillary orders setting a timetable for any further material and for the delivery of written outlines of argument.

[7] The estimate apparently provided to her Honour was a gross underestimate. With reading time, the disposition of the hearing plainly required a full day. The parties should have approached the Court to make those arrangements. As it was, I heard the application on the applications list over four hours into the early evening on 2 July 2020.

[8] For reasons which follow, in my view the application should be dismissed.

The relief which AECI seeks to establish at trial

[9] By its originating application, AECI seeks the following orders:

(a) a declaration that the employment agreement is binding on and enforceable against the Employee;

(b) as against the Employee, that he be restrained from engaging in any conduct in contravention of his obligations under cl 13.2 of the employment agreement, including:

2.1 Being involved in Australia as an employee, manager, contractor, consultant, adviser, agent or director:

2.1.1 in the provision of explosive manufacturing plant management or similar services, or

2.1.2 in any activity of a like or similar kind to that which [the Employee] was interested or engaged in during the course of his employment with [AECI] under [the employment agreement],

2.1.3 by any entity that conducts the business of manufacturing and supplying commercial explosives, initiating systems, blasting solutions and services and related services which are similar to that of [AECI] within Australia, including, but not limited to, [IPL] and Dyno Nobel Pty Ltd,

2.1.4 for a period of

2.1.4.1 12 months, or, in the alternative,

2.1.4.2 6 months,

after the termination of his employment with [AECI] under [the employment agreement] on 12 June 2020.

2.2 Soliciting, interfering with or attempting to entice away from [AECI] or any other company related to [AECI] any:

2.2.1 material customer, or

2.2.2 customer in the habit of dealing with [AECI] or any other company related to [AECI],

including, without limiting the foregoing, Anglo American PLC, Dyno Nobel Pty Limited, Glencore PLC, PT Kaltim Prima Coal (KPC), Orica Ltd, Rio Tinto Limited, [Thiess] Pty Limited and their related body corporates.

(c) as against IPL, that it be a restrained from engaging the Employee in Australia as an employee, manager, contractor, consultant, adviser, agent or director:

3.1 in the provision of explosive manufacturing plant management or similar services, or

3.2 in any activity of a like or similar kind to that which [the Employee] was interested or engaged in during the course of his employment with [AECI] under [the employment agreement],

3.3 for a period of

3.3.1 12 months, or, in the alternative,

3.3.2 6 months,

after 12 June 2020.

(d) an order that the Employee and IPL pay its costs of the proceeding.

[10] The foundation of the relief sought against the Employee is contractual. AECI asserts that it has the benefit of contractual restraints which are binding on and enforceable against the Employee and that, unless restrained, the Employee threatens to breach those contractual restraints.

[11] IPL is not party to any contract with AECI. The foundation of the case against it is the tort of inducing breach of contract. AECI asserts that, knowing of the Employee's restraints, IPL has intentionally induced the Employee to breach them, by making and maintaining its offer to employ him.

The interlocutory relief which AECI seeks

[12] By its interlocutory application, and upon the usual undertaking as to damages, AECI seeks, among other things, the following orders:

(a) as against the Employee, that he be restrained from engaging in any conduct in contravention of his obligations under cl 13.2 of the employment agreement, including:

4.1 Being involved in Australia as an employee, manager, contractor, consultant, adviser, agent or director

4.1.1 in the provision of explosive manufacturing plant management or similar services, or

4.1.2 in any activity of a like or similar kind to that which [the Employee] was interested or engaged in during the course of his employment with [AECI] under the [employment agreement],

4.1.3 by [IPL] or Dyno Nobel Pty Ltd,

4.2 Soliciting, interfering with or attempting to entice away from [AECI] or any other company related to [AECI] any

4.2.1 material customer, or

4.2.2 customer in the habit of dealing with [AECI] or any other company related to [AECI],

including, without limiting the foregoing, Anglo American PLC, Dyno Nobel Pty Limited, Glencore PLC, PT Kaltim Prima Coal (KPC), Orica Ltd, Rio Tinto Limited, [Thiess] Pty Limited and their related body corporates.

(b) as against IPL, that it be a restrained from engaging the Employee in Australia as an employee, manager, contractor, consultant, adviser, agent or director:

5.1 in the provision of explosive manufacturing plant management or similar services, or

5.2 in any activity of a like or similar kind to that which [the Employee] was interested or engaged in during the course of his employment with [AECI] under [the employment agreement].

Legal principles governing AECI's application for interlocutory relief

[13] On an application for an interlocutory injunction, it is necessary to make two main inquiries: first, has the applicant shown that it has a prima facie case, and second, has the applicant shown that the balance of convenience favours granting the relief claimed.[1]

[14] In order to satisfy the first inquiry, an applicant does not have to show that it will probably succeed at trial. Rather, it is sufficient that the applicant shows a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.[2] How strong the probability of success needs to be depends upon the nature of the rights asserted and the practical consequences likely to follow from the orders sought.[3] The first inquiry is sometimes described as whether there is a "serious question" to be tried. There is no objection to the use of that phrase if it is understood as conveying the notion that the seriousness of the question must, like the likelihood of success, be sufficient in the circumstances to justify the order sought.[4]

[15] The second inquiry is whether the balance of convenience supports the relief claimed; in other words, whether the inconvenience or injury which the applicant would be likely to suffer if an injunction were refused outweighs, or is outweighed by, the injury which the respondent would suffer if an injunction were granted.[5] The adequacy of an award of

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1 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65]-[72] per Gummow and Hayne JJ (Gleeson CJ and Crennan J agreeing at [19]); *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334 at [37]-[38].

2 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65].

3 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622, cited with approval in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65].

4 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [70]-[71].

5 *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 at [87].

damages and the question of the sufficiency of the usual undertaking are to be considered as part of the totality of the balance of convenience question.[6]

[16] The two inquiries are related and not independent of each other, so that the weight of considerations in regard to one may well affect the other.[7]

[17] One example of this relationship occurs where the grant of an interlocutory injunction would have the same practical effect as if the applicant were granted final relief. In such circumstances, a Court might require the applicant to demonstrate a stronger probability of success than might be required in a different case. Of such a case, *Amalgamated Pest Control Pty Ltd v SM & SE Gillece Pty Ltd* [2016] QCA 260, Jackson J observed (McMurdo P and Gotterson JA agreeing):[8]

> In those circumstances, it is desirable for the court to evaluate (if it can) and take into account the strength or weakness of the applicant's case for final relief.[9] Also, in those circumstances, the court may refuse an interlocutory injunction even if the applicant has a strong case for a final injunction for breach of contract in restraint of trade.[10]

[18] The bottom line is that in making its decision on an application for an interlocutory injunction, the Court should weigh in the balance all relevant factors, including the strength of the case to be tried and the factors affecting the balance of convenience. Then the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong", in the sense of granting an injunction to a party which fails to establish its right at an ultimate trial, or failing to grant an injunction to a party which succeeds at trial.[11]

Is there a prima facie case that the Employee threatens conduct in breach of the restraints?

[19] The issues which must be considered in relation to this inquiry are:

(a) whether the contractual restraints sought to be enforced are valid and enforceable; and

(b) whether the Employee threatens conduct in breach of each such restraint.

Principles by which validity is to be assessed

[20] In *Just Group Ltd v Peck* (2016) 344 ALR 162, the Victorian Court of Appeal identified the relevant principles in a way which is sufficient for present purposes:[12]

> [30] A term in a contract, which is a restraint of trade ('a restraint clause'), is presumed to be void as contrary to public policy.
>
> [31] The presumption may be rebutted if there are special circumstances that demonstrate the covenant to be:
>
> (a) reasonable as between the parties; and
>
> (b) not unreasonable in the public interest.

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6 *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334 at [39]; see also *Sino Iron Pty Ltd v Mineralogy Pty Ltd (No 2)* [2017] WASCA 76 at [131]. The sufficiency of AECI's undertaking was not the subject of challenge before me.

7 *Live Earth Resource Management Pty Ltd v Live Earth LLC* [2007] FCA 1034 at [13]; *Warner-Lambert Co LCC v Apotex Pty Ltd* (2014) 311 ALR 632 at [70]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 at [87].

8 At [45], footnotes in original.

9 *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533 at 536.

10 *Hermescec v Carcagni* [2008] NSWSC 183 at [23]; *Jaddcal Pty Ltd v Minson* [2011] WASC 28 at [55]-[60]; *Reed Business Information v Seymour* [2010] NSWSC 790 at [64]-[67].

11 *Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65 at [35]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 at [84]; *Siemens Gamesa Renewable Energy Pty Ltd v Bulgana Wind Farm Pty Ltd* [2019] VSCA 318 at [107].

12 (2016) 344 ALR 162 at [30]-[37] per Beach and Ferguson JJA and Riordan AJA, footnotes omitted.

[32] The test of reasonableness varies depending on 'the situation the parties occupy and so recognising different considerations which affect employer and employee and independent traders or business men, particularly vendor and purchaser of the goodwill of a business'. A court takes a 'stricter view' of restraint clauses in employment contracts; and will more readily uphold a restraint clause in favour of a purchaser of the goodwill of a business than a restraint clause in favour of an employer. In particular, a purchaser of a business is entitled to protect itself from competition by the vendor; but an employer is not entitled to protect itself from competition per se by an employee.

[33] A restraint clause in favour of an employer will be reasonable as between the parties, if at the date of a contract:

(a) the restraint clause is imposed to protect a legitimate interest of the employer; and

(b) the restraint clause does no more than is reasonably necessary to protect that legitimate interest in its:

(i) duration; or

(ii) extent.

[34] It is well established that employers do have a legitimate interest in protecting:

(a) confidential information and trade secrets; and

(b) the employer's customer connections.

[35] For the legitimate purpose of protecting the employer'[s] confidential information, a restraint clause does not need to be limited to a covenant against disclosing confidential information. It may restrain the employee from being involved with a competitive business that could use the confidential information.

[36] The onus of proving the special circumstances from which the Court may infer 'reasonableness between the parties' is on the person seeking to enforce the covenant. However, if an employee or other covenantor alleges that the restraint clause is against the public interest, the burden of proving that proposition is on the employee/covenantor.

[37] Once the facts that are contended to constitute the special circumstances have been established, it is a matter of law whether the restraint clause is reasonable as between the parties. Accordingly, on appeal, the trial judge's 'decision that the covenants were reasonable is not a decision of fact and an appellate court in reviewing such a decision inquires not whether it has been shown to be wrong, but simply whether it is right'.

The proper construction of the contractual restraints

The relevant context

[21] AECI Limited is a company listed on the Johannesburg Stock Exchange in South Africa. It is a holding company for a diversified group of 16 companies, including its Australian subsidiary, AECI. The 16 companies within the group operate in a number of countries within Africa and also in Indonesia, Australia, Chile, China and Brazil. The group as a whole claims a global footprint covering businesses involving mining solutions, water and process, plant and animal health, food and beverage, chemicals and property and corporate.

[22] Unlike its parent company AECI Limited, AECI itself does not have a global footprint. AECI operates within the mining solutions area of the group's business, but in Australia. AECI provides to its customers an extensive range of products for use in both open cut and underground applications, including explosive materials, initiating systems, detonators and mobile process units. It operates in Queensland, New South Wales and Western Australia, where it is licensed to import, store and trade in such materials.

[23] Although AECI itself does not have a global footprint, there is a group-wide practice of assistance and co-operation between members of the group. Amongst the foreseeable consequences of that practice would be that the senior executives of AECI could be expected to become aware of confidential information and strategic plans of other members within the group.

[24] The Employee had been working at a senior level within AECI for a few years before entering into the subject employment agreement. I infer that the context I have referred to above must be facts that should be regarded as known to both parties to the employment agreement at that time.

[25] The employment agreement was not executed until December 2018, but although not executed until then, the agreement recorded that it was made on 1 October 2017, thereby revealing the parties' intention that it would operate to govern their relationship from the earlier date. That is consistent with the fact that the Employee's promotion to the senior executive position governed by the agreement took effect on 1 October 2017.

[26] Notably, by the time of execution of the agreement, both parties must have known of some further considerations concerning the relationship between group members and the information to which the Employee would likely become privy by virtue of his position.

[27] In the first place, they would certainly have known that the Employee would, by virtue of his appointment as a senior executive, be exposed to group-wide information. AECI's Mr Etwell deposed:

> [60] I am informed by Mr Fernandes and believe that on about 1 October 2017, [the Employee] joined the AEL Executive Team. By joining the AEL Executive Team, [the Employee] had access to AEL overall operations, by virtue of his attendance of AEL EXCO monthly meetings, AEL Board meetings held quarterly and AECI TOP 40 meetings, where attendance is limited to [AECI Limited] executive management team, which occurred twice a year. [The Employee] reported at such meetings on what had occurred in the Asia Pacific region.
>
> [61] [The Employee's] promotion to the AEL Executive Team meant that [the Employee] acquired additional responsibilities and in particular, responsibilities for the Asia Pacific region. As an executive of [AECI], [the Employee] undertook responsibilities in connection with [AECI], AEL Indonesia and Indonesian Joint Venture, Black Bear Resources (BBRI). [The Employee] was also involved in the management of the AECI China office.
>
> [62] As a senior manager within the AECI Group, Mr Convey attended 'AECI TOP 120' management meetings, which occurred twice a year. The 'AECI TOP 120' meetings occur all throughout the world and are attended by the most senior 120 employees of the AEL Group. This provided [the Employee] with visibility within the AECI Group, in terms of various other chemical products provided to other customer[s] outside of the mining industry within the AECI Limited Group.

[28] But second, the group-wide practice of assistance and co-operation between members of the group was such that, by the time of execution of the employment agreement, the Employee had in fact performed work for other group members in areas well beyond the particular sphere of operation of AECI in Australia, and had necessarily been exposed to their confidential information.

The terms of the employment agreement

[29] The employment agreement was a contract between AECI and the Employee by which the Employee agreed to accept employment with AECI as "Executive: Asia Pacific": recitals and cl 2. It operated during a probation period and thereafter could be terminated by either side in particular ways: cll 3 and 15. In particular, the agreement could be terminated by the Employee giving three months' notice in writing of his resignation, and in that event AECI was permitted to require the Employee not to attend the office or undertake any work (or only limited work) for all or any part of the notice period: cll 15.1.2 and 15.2.

[30] Clause 4 specified the Employee's duties. Amongst other things, he was required to "faithfully and diligently perform the duties and exercise the powers consistent with the Employee's position or such other role assigned by AECI to the Employee" (cl 4.1.2) and to "promote the interests of AECI and any Group Company" (cl 4.1.3). "Group" was defined to include AECI and any Group Company, and "Group Company" was defined to

include any related body corporate of AECI within the meaning of the *Corporations Act*. Given the facts known to the parties at the time of entering into the agreement, the phrase would be construed as extending to encompass AECI Limited and the other companies within its group.

[31] The Employee's remuneration was that specified in the "Total Remuneration Package" in Schedule 1: cl 6.1. The amount is only relevant insofar as it related to the amount which the Employee was to be paid for agreeing to the restraints presently sought to be enforced. I will come back to that.

[32] The Employee was required by cl 11 to execute a confidentiality deed in the form set out in Schedule 2, it being noted that those obligations would survive any termination of the employment agreement or the Employee's employment. The Employee did execute such a confidentiality deed. As to that deed:

(a) It recorded in cl 1 that AECI had developed and used "Confidential Information" in connection with its business, including –

(i) "information provided to AECI relating to or in connection with its Members' assets, operations, contractual entitlements, provision of services to its customers or its Members", Members being a term defined to mean "any AECI group company and their subsidiaries and associates"; and

(ii) "information about AECI's Members".

(b) It recorded in cll 3 and 4 the Employee's understanding that he would come into contact with Confidential Information and that:

(i) it belonged to AECI "and/or its Members or other third parties";

(ii) a breach of the deed would be harmful to AECI's business interests; and

(iii) damages alone might not be a sufficient remedy for breach and AECI was entitled to seek and obtain injunctive relief.

(c) It recorded in cl 5 the Employee's agreement and undertaking, among other things:

(i) to keep secret all Confidential Information and not to disclose it to anyone outside AECI without AECI's prior written consent; and

(ii) that his obligations under the deed would continue indefinitely after he ceased employment with AECI.

[33] The restraints relevant to the present application were set out in cl 13 of the employment agreement.

[34] The relevant post-termination restraints were set out in cl 13.2.2 in these terms:

> In the event of the termination of his employment services, the Employee must not, for the period(s) specified in Item 1 of Schedule 3 (**the Restraint Period**) after the Employee's employment is terminated (for whatever reason), in the area(s) specified in Item 2 of Schedule 3 (**the Restraint Area**) without AECI's prior written consent:
>
> (a) be involved as an employee, manager, contractor, consultant, adviser, agent or director in the provision of explosive manufacturing plant management or similar services, or any activity of a like or similar kind to that which the Employee was interested or engaged in during the course of his Employment under this Agreement by any business identified in Item 3 of Schedule 3;
>
> (b) induce or attempt to induce any director, manager or employee of AECI or any Group Company to terminate his or her employment with AECI or any Group Company whether or not that person would commit a breach of that person's contract of employment;
>
> (c) solicit, interfere with or attempt to entice away from AECI or any Group Company any employee, contractor or agent; and

(d) solicit, interfere with or attempt to entice away from AECI or any other Group Company a material customer or a customer in the habit of dealing with AECI or any other Group Company.

[35] The employment agreement also contained the following relevant acknowledgments concerning the post-termination restraints:

(a) in cl 13.2.1:

> The Employee acknowledges that:
>
> (a) his employment with AECI gives him unique and substantial access to Confidential Information and Intellectual Property of AECI and/or other members of the Group;
>
> (b) in the event that the Employee breaches clause 13.2.2 AECI and/or the Group may be exposed to significant and potentially irreparable damage to its business;
>
> (c) the obligations in clause 13.2.2 are reasonable in scope and duration and necessary for the protection of the goodwill and legitimate business interests of AECI and/or the Group; and
>
> (d) the Employee and AECI intend clause 13.2 to operate to its maximum extent and the Employee's employment, and Item 4 in Schedule 3, are adequate consideration for the restraint.

(b) the restraints resulting from any combination of the wording in cl 13.2.2 read with the applicable provisions of Schedule 3 were to be read as separate and independent restraints, severable from others, so that if a Court found any one to be unenforceable, the enforceability of the remainder would not be affected: cl 13.4; and

(c) the restraints were to survive any termination of the employment agreement: cl 13.5.

[36] I interpolate, in relation to cll 13.2.1 and 13.2.2, that Item 3 of Schedule 3 reveals that the maximum duration of the cl 13.2.2 restraint was 12 months, and that Item 4 in Schedule 3 specified compensation for that restraint, equivalent in amount to one year's salary, to be paid as a cash bonus by three payments over a three-year period, each of the value of one third of one year's salary.

[37] By cl 19.8, the Employee represented that he had taken or had the opportunity of taking legal advice in relation to the nature, effect and extent of the agreement, including in particular cll 11 and 13.

The proper construction of the restraints

[38] Against that background, it is appropriate to turn to the proper construction of the cl 13.2.2 restraints.

[39] Subparagraphs (b) and (c) are not presently relevant. It is appropriate, however, to consider how the chapeau of the clause should operate with subparagraphs (a) and (d). It is convenient to refer to the two separate operations respectively as "the first restraint" and "the second restraint".

[40] Moreover, for present purposes, the sense in which the restraints are most relevant is in their capacity to affect the Employee's involvement as an employee of IPL. Focussing only on this aspect allows the elimination of irrelevant verbiage in the expression of the constraints so as to enable their construction to be better understood.

[41] It follows that –

(a) the first restraint should be understood in the following way, noting that I have re-formatted (a) for sense:

> [T]he Employee must not, for … the Restraint Period after [12 June 2020], in … the Restraint Area without AECI's prior written consent:
>
> (a) be involved as an employee … in:
>
> (i) the provision of explosive manufacturing plant management or similar services; or

(ii) any activity of a like or similar kind to that which the Employee was interested or engaged in during the course of his Employment under this Agreement,

by any business identified in Item 3 of Schedule 3;

(b) the second restraint should be understood in the following way:

[T]he Employee must not, for … the Restraint Period after [12 June 2020], in … the Restraint Area without AECI's prior written consent:

…

(d) solicit, interfere with or attempt to entice away from AECI or any other Group Company a material customer or a customer in the habit of dealing with AECI or any other Group Company.

[42] Items 1, 2 and 3 of Schedule 3 were in these terms:

Item 1 – Restraint Period:

(a) Twelve (12) months;

(b) Six (6) months.

Item 2 – Restraint Area:

(a) Australia;

Item 3 – Competitor Identities

Those entities that conduct the business of manufacturing and supplying commercial explosives, initiating systems, blasting solutions and services and related services which are similar to that of AECI within the Restraint Area as identified in Item 2 of Schedule 3 including, but not limited to the following companies and their related or associated entities:

- Orica Australia Pty Ltd;
- Dyno Nobel Pty Ltd;
- Maxam Australia Pty Ltd;
- LDE Corporation Australia Pty Ltd; or
- Downer EDI Ltd.

[43] Inserting those definitions as appropriate, it follows that –

(a) the first restraint should be understood in the following way:

[T]he Employee must not, for [a period of 12 months or 6 months] after [12 June 2020], in [Australia] without AECI's prior written consent:

(a) be involved as an employee … in:

(i) the provision of explosive manufacturing plant management or similar services; or

(ii) any activity of a like or similar kind to that which the Employee was interested or engaged in during the course of his Employment under this Agreement,

by [those entities that conduct the business of manufacturing and supplying commercial explosives, initiating systems, blasting solutions and services and related services which are similar to that of AECI within Australia including, but not limited to the following companies and their related or associated entities:

- Orica Australia Pty Ltd;
- Dyno Nobel Pty Ltd;
- Maxam Australia Pty Ltd;
- LDE Corporation Australia Pty Ltd; or
- Downer EDI Ltd.]

(b) the second restraint should be understood in the following way:

[T]he Employee must not, for [a period of 12 months or 6 months] after [12 June 2020], in [Australia] without AECI's prior written consent:

…

(d) solicit, interfere with or attempt to entice away from AECI or any other Group Company a material customer or a customer in the habit of dealing with AECI or any other Group Company.

[44] One final simplification of the manner of expression of the first restraint may be essayed with a view to assisting in understanding the parties' intention. It is common ground that IPL falls within the ambit of "any business identified in Item 3 of Schedule 3", because of the nature of its business and the fact that it is a related entity to Dyno Nobel Pty Ltd. It follows that the first restraint should be understood in the following way:

> [T]he Employee must not, for [a period of 12 months or 6 months] after [12 June 2020], in [Australia] without AECI's prior written consent:
>
> (a) be involved as an employee … in:
>
> (i) the provision of explosive manufacturing plant management or similar services; or
>
> (ii) any activity of a like or similar kind to that which the Employee was interested or engaged in during the course of his Employment under this Agreement,
>
> by [IPL].

[45] The following observations flow from the way in which the clause has been structured.

[46] **First**, the clause expresses a prohibition against the Employee doing the activities the subject of the first restraint and the second restraint without AECI's prior written consent.

[47] **Second**, that prohibition only operates for a particular period commencing on the date of his termination, namely the Restraint Period. The Restraint Period is 12 months or, if the Court regards that period to be unenforceable, 6 months. There is no intention for the clause to prohibit the Employee from doing the relevant activities after the Restraint Period has expired. Any prohibition in that case would be dependent on other clauses, for example, cl 11 and the promises contained in the Confidentiality Deed.

[48] **Third**, the clause only prohibits the Employee from doing the activities the subject of the first restraint and the second restraint in a particular area, namely the Restraint Area: "the Employee must not … in the … Restraint Area…". There is no intention for the clause to prohibit the Employee from doing the prohibited activities if the Employee is outside the Restraint Area. The area nominated is Australia. AECI submitted, and I agree, that for practical purposes, that means that the Employee must not do the activities the subject of the first restraint and the second restraint while he is physically located within Australia. The corollary, of course, is that the clause does not operate to prohibit him from doing them if he is physically located outside Australia.

[49] **Fourth**, so far as the first restraint is concerned, the clause prohibits the Employee in Australia from being involved as an employee in two defined classes of activity by IPL. Notably, the Restraint Area applies to the Employee, not to the types of activity by IPL in which he is prohibited from being engaged as an employee. Thus the Employee must not in Australia be involved as an employee in one of those two classes of activity by IPL, wheresoever in the world IPL is carrying out that activity.

[50] **Fifth**, and again, so far as the first restraint is concerned, the Employee is not prohibited from being involved as an employee in any other activities by the defined entities. Nor is the Employee prohibited from being involved as an employee in the two defined classes of activity by entities who do not fall within the defined class of entity.

[51] **Sixth**, so far as the second restraint is concerned, the clause prohibits the Employee in Australia from soliciting, interfering with or attempting to entice away from AECI or any other Group Company a material customer or a customer in the habit of dealing with AECI or any other Group Company. It does not prohibit the Employee anywhere else in the world from doing those things. But it would prohibit the Employee in Australia from

soliciting customers, wheresoever in the world those customers were, and even though they were customers of another Group Company and not of AECI.

[52] Both the Employee and IPL sought to persuade me against the construction recorded in the third and fourth points above. However, in my view, their arguments paid insufficient attention to the unambiguous express structure of the restraint clause and, in particular, the placement of the defined term "Restraint Area" within that structure. The essence of their argument was that to give the restraints the construction which I have reached would inevitably lead to invalidity because the Court would be driven to conclude that the extent of the restraints was far broader than was reasonably necessary to protect the legitimate interests of AECI. Whilst I accept that a construction which will preserve the validity of the contract is to be preferred to one which will make it void,[13] that must only be in the case of ambiguity and if the wording permits.[14] In this case it seems to me that the Employee and IPL are inviting me to adopt the impermissible approach of rewriting the restraint clause to preserve its validity. As the Victorian Court of Appeal observed in *Just Group Ltd v Peck*:[15]

> … it is not permissible for the Court to approach the construction of a restraint clause by first determining what degree of restriction would be justified; and then reading down an unduly wide clause in order to preserve its validity. The Court may not adopt a restrictive interpretation for the purpose of saving the restraint clause [from] invalidity.

[53] In my view, the evident intention of the parties by their contract was to cast the net broadly with a view to protecting not merely AECI's own confidential information and trade customers, but also the confidential information and customers of all the other members of the Group. This conclusion is strongly supported by (1) the many textual references to Group Company in cl 13.2.2, but also (2) by the terms of the acknowledgements in cll 13.2.1 and 13.3 which all refer to interests beyond the interests merely of AECI and extend to interests of the Group and of Group Companies, and (3) by the terms of cl 11 and of the confidentiality deed. This construction is also strongly supported by the context to which I have referred.

Is there a prima facie case that the Employee threatens conduct in breach of the restraints?

[54] The Employee has been offered and has accepted employment with IPL. The position description of the new role suggests that his role will be "to develop and deliver [IPL's] international (regions beyond existing Asia Pacific and Americas) technology licensing and sales strategy". It was common ground that IPL falls within the ambit of "any business identified in Item 3 of Schedule 3", and the evidence certainly established an arguable case of that proposition.

[55] The available evidence gives rise to an arguable case that such a role would require the Employee to be involved, as an employee, in activities of a similar kind to that in which he was interested or engaged during his employment with AECI. Indeed, there was no serious argument before me against the proposition that, if the first restraint were construed in the way I have construed it, the Employee should be regarded as threatening conduct in breach of the restraint. At the least, that must be so because of the Employee's subjective view of the meaning of the restraints. His subjective intention is irrelevant to the proper construction of the clause, but it does inform the meaning to be given to his deposed intention to continue to honour the restraints:

> 6. At the time of entering into my contract of employment with [AECI] dated 1 October 2017 (**AECI Contract**), I understood that the restraint was to prevent me, for potentially up to 12 months,

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13 *Pearson v HRX Holdings Pty Ltd* (2012) 205 FCR 187 at [45].

14 *AGA Assistance Australia Pty Ltd v Tokody* [2012] QSC 176 at [23].

15 *Just Group Ltd v Peck* (2016) 344 ALR 162 at [38](c) per Beach and Ferguson JJA and Riordan AJA.

> performing an equivalent role, specifically being responsible for the performance of a business unit, including for the named restricted entities, within Australia, which would put [AECI's] business at risk. There was never any discussion about the restraint having any application outside of Australia. I completely reject any suggestion that this was ever intended or implied. Such a restraint would deprive me of the ability to work at all.
>
> 7. My input into the drafting of the restraint clause is limited to identifying the entities listed at Schedule 3, Item 3 of the AECI Contract. I had no input into the substantive drafting of the restraint clause. Other than to provide the names as mentioned, the restraint was drafted by a solicitor engaged by [AECI] in 2014 as a generic pro forma employment contract. The generic clause was adapted in 2018 by Rhonda Hamilton, the compensation and benefits manager employed by [AECI] for the drafting of my AECI Contract.
>
> 8. The role of Senior Vice President – International Business Development at [IPL] (**Position**) is not an equivalent role to that which I performed for [AECI], rather the Position is an overhead role created with the intent of selling or licensing IPL's technology to companies / entities outside of IPL's existing business areas. All of that will occur outside Australia.
>
> 9. I will continue to honour the terms of the restraint in the AECI Contract in the context of only undertaking work for IPL that focuses on regions outside of Australia with no connection to the Australian operations of IPL or Dyno Nobel nor any Australian customers of [AECI].

[56] In my view, a prima facie case that the Employee threatens conduct in breach of the first restraint has been established on the evidence.

[57] The same view should be reached in relation to the second restraint.

[58] The Employee deposed to the following:[16]

(a) he has no knowledge of the status of AECI's contract with its key customer, Thiess Pty Limited (which accounts for greater than 50% of AECI's sales);

(b) Thiess Pty Limited is not a target of the Employee's role at IPL;

(c) although the Employee was involved in the negotiation of an important toll manufacturing agreement with Dyno Nobel, he expects that that agreement would have been executed many months ago and secure in the hands of AECI; and

(d) in any event, his employment at IPL would have no practical implication for the operation of the toll manufacturing agreement.

[59] I observe that, in light of his subjective understanding of the scope of the restraint, his statement about honouring the restraint and his expression of view in relation to one relevant customer are insufficient. In my view, a prima facie case that the Employee threatens conduct in breach of the second restraint has been established on the evidence.

Is there a prima facie case that the restraints are valid and enforceable against the Employee?

[60] The applicant contended that the first and second restraints were reasonable because they went no further than necessary for the reasonable protection of AECI's legitimate interests in protecting its confidential information and customer connections.

[61] One difficulty with that proposition is that the evident purpose of the two restraints was to extend the protection sought by the restraints beyond AECI's own confidential information and beyond its connections with its own customers, and into the arena of protecting the confidential information and customer connections of the broader Group as a whole and of each Group Company individually.

[62] Thus, as to the second restraint, IPL submitted:

> It also could not have been the parties' (reasonable) intention to preclude [the Employee] from interacting with any customers of [AECI] or any of its related entities, worldwide. As Mr Etwell's affidavit shows, [AECI] is a related entity of AECI Limited, a holding company for a diversified group of 16 other

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16 Affidavit of Nigel Convey affirmed 24 June 2020 at [48]-[53].

> companies throughout the world, which trade not just in "mining solutions" but in "water and process, plant and animal health, food and beverage, chemicals and property and corporate". [The Employee] could not possibly know the identity of all of the AECI Group's customers. A construction of the area restraint which governed only [the Employee's] location would put him in a situation where he could breach clause 13.2.2(d) without even knowing it. …
>
> Further, construed in that manner the clause would be unjustifiable, because:
>
> (a) As Edelman J said in *Emeco International Pty Ltd v O'Shea (No 2),* other than in exceptional cases:
>
> [187] …By definition, a nonsolicitation or client restraint which extends beyond those customers with whom the employee had a substantial connection would go beyond the legitimate interests of the employer in protecting the customer connections developed by the employee.
>
> (b) A covenant against soliciting the customers of a company other than the employer company is void, even if they are connected companies.

[63] In *Koops Martin Financial Services Pty Ltd v Reeves* [2006] NSWSC 449, Brereton J put the general rule in these terms:

> 78 Generally, therefore, a restraint against the solicitation of customers of a company other than the employer is void, even though the companies are related, although there is an exception where the holding company effectively carries on business through the subsidiaries. Ultimately this is an emanation of the underlying principle which depends on special knowledge or influence over customers acquired in the course of employment: ordinarily, the employee of one subsidiary will not acquire such knowledge or influence in respect of clients of others, though a senior employee of the holding company might.

[64] I am not persuaded that the evidence justifies a conclusion that AECI has established a prima facie case as to the reasonableness of the second restraint, given the breadth of its extent. Whilst it may have been contemplated that, in the course of his employment with AECI, the Employee may have acquired some knowledge or influence in respect of some clients of some of the other Group Companies, the evidence does not support a conclusion that that knowledge could have reached the extent which would justify the restraint, on its proper construction. It is possible that the second restraint might be regarded as enforceable with the elimination of references to the Group Companies, but for present purposes that possibility does not matter because the terms of the interlocutory injunction sought by AECI depend on the existence of a prima facie case in relation to the second restraint as contractually formulated.

[65] The position in relation to the first restraint is somewhat different, and there are factors pointing both for and against the conclusion of reasonableness, and therefore validity.

[66] AECI submitted that where the interest sought to be protected by a restraint is the employer's confidential information, the court must be satisfied that, at the time of contract, the nature of the employee's proposed employment was such that they would be exposed to the employer's confidential information and trade secrets.[17] And it submitted that a recognised method of protection against misuse of confidential information by an employee is a restraint, such as cl 13.2.2(a), upon an employee who has been given access to such information, preventing them from taking up employment with a competitor.[18] It submitted that covenants against the use or disclosure of confidential information can be unsatisfactory where a business's confidential information may easily be carried away by a former employee in their head and used against that business if the former employee commences work for a competitor.[19] It submitted that, by contrast, a covenant pursuant to which an employee is not to commence work for a competitor is easier to enforce than a breach of confidence or breach of copyright claim; it removes the temptation for the former

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17 *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423.

18 *EzyDVD Pty Ltd v Lahrs Investments Qld Pty Ltd* [2010] 2 Qd R 517 at [26].

19 *EzyDVD Pty Ltd v Lahrs Investments Qld Pty Ltd* [2010] 2 Qd R 517 at [27], citing *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 at 1479.

employee to offer, and for the new employer to solicit, confidential information; and it provides certainty of definition as regards the area of confidential information to be protected.[20]

[67] These propositions may be accepted. But the first restraint extended well beyond the sphere of AECI's competition and its interest in the misuse of its own confidential information in the two classes of activity with which it dealt, and into the sphere of competition of other members of the Group who engaged in those classes of activity in other areas of the world and their interest in the misuse of their own confidential information. In that context, it seems to me that to support the reasonableness of the first restraint, AECI must satisfy the Court that, at the time of contract, the nature of the Employee's proposed employment was such that he would be exposed to those entities' confidential information and that it formed part of his duty owed to AECI to protect that information.

[68] Factors which suggest that AECI can do so are:

(a) As I have mentioned, the employment agreement required the Employee to "faithfully and diligently perform the duties and exercise the powers consistent with the Employee's position or such other role assigned by AECI to the Employee" (cl 4.1.2) and to "promote the interests of AECI and any Group Company" (cl 4.1.3).

(b) The affidavits of Mr Etwell demonstrate that at the time of contract both AECI and the Employee must have contemplated that he would be exposed to the confidential information and trade secrets of other Group Companies conducting activities in other areas of the world in the two classes of activity with which the first restraint dealt.

(c) Events subsequent to the contract explained in Mr Etwell's second affidavit, to which it is permissible to have regard in order to assess what the parties might reasonably have expected about the extent and nature of the confidential information,[21] support that conclusion.

[69] AECI submits that the following further matters support a conclusion that the restraint was reasonable:

(a) the employment agreement was the subject of "protracted" negotiations, much of which related primarily to the restraint clause;[22]

(b) in return for the restraint clause, the Employee had bargained for[23] and obtained payment in advance for the restraint, to be paid in three instalments over the first three years of his employment in that role (the first two of which have in fact been paid and the third of which is not yet payable);

(c) the Employee represented by cl 13.3 that he acknowledged that the restraints were "fair and reasonable to protect the interests of AECI and the Group including AECI and the Group's goodwill and business"; and

(d) the Employee represented by cl 19.8 that he had taken, or had the opportunity of taking, legal advice in relation to the nature, effect and extent of the employment agreement, including in relation to the restraint of trade clause.

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20 *EzyDVD Pty Ltd v Lahrs Investments Qld Pty Ltd* [2010] 2 Qd R 517 at [26], citing *Woolworths Ltd v Olson* [2004] NSWCA 372.

21 See *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423 at [123].

22 Affidavit of Duncan Etwell affirmed 8 June 2020 at [35].

23 Affidavit of Duncan Etwell affirmed 8 June 2020 at [36]-[37], [42]-[43].

[70] Although there is no evidence that the Employee actually obtained independent legal advice, and the extent to which the two negotiating parties might be regarded as on equal footing might be debatable, I am inclined to agree that those matters, particularly the point about consideration, do provide considerable support for AECI's case. Apart from the point next dealt with, I would have assessed AECI's prima facie case in relation to the validity of the first restraint to be strong.

[71] On the other hand, the formulation of the restraint is a curious one. As I have demonstrated, the Employee is obliged not to do the activities the subject of the first restraint while he is physically located within Australia. The corollary, of course, is that he could do them if he were physically located outside Australia. IPL submitted, on that construction, that the Employee could perform his role for IPL from a location outside Australia and the extent of any protection which AECI obtained from cl 13.2.2 against the misuse of Group Company confidential information would be severely compromised. In reality, it would be regarded as effectively providing no more protection than what is already provided by other clauses of the employment agreement by which the Employee promised he would not misuse confidential information. In such a case, could it really be considered reasonable, as between employer and employee as at the time of contract, that the protection turned on where the Employee was located? Or, to put it another way, if AECI did not seek to restrain the Employee from embarking on the relevant activities from a location outside Australia, when at the time of contract both parties would necessarily have assumed that travelling overseas would be an easy and unremarkable step,[24] then AECI must have accepted that, in reality, its interest was sufficiently protected by the other contractual terms preventing misuse of confidential information. And if that were so, what interest could it legitimately have in any further protection only whilst the Employee is located within Australia? AECI did not identify any persuasive response to these questions. Given the "stricter view" that Courts take of restraints in employment contracts, this seems to me to weaken AECI's case considerably.

[72] I have explained that in order to satisfy the prima facie case inquiry, an applicant does not have to show that it will probably succeed at trial. However, as the High Court put it in *Australian Broadcasting Corporation v O'Neill*, the governing consideration is that the requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought.

[73] In this case, the nature of the rights asserted is the right to prevent the Employee from taking up his proposed new employment with IPL. AECI's case for final relief is that it is entitled to do so for a 12-month period starting on 12 June 2020. By the proposed start of the Employee's new employment, AECI will have had the benefit of one month of the 12-month period it seeks. But if I grant the interlocutory injunction for a further month, it will have had two months of that period. Each further month (or day, for that matter) would increase the proportion of the benefit which AECI would have of the 12-month period it seeks. The truth is that any grant of interlocutory relief in relation to the first restraint will have the practical effect of granting AECI final relief to the extent of the period over which the interlocutory relief operates.

[74] In those circumstances, I would require AECI to demonstrate a strong probability of success as against the Employee. My evaluation of the significance of the factors to which I have referred leads me to conclude that AECI has not done that.

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24 The time of contracting preceded the present impact of the COVID-19 pandemic.

Is there a prima facie case for enforcement as against IPL?

[75] I have explained that the foundation of the case against IPL is the tort of inducing breach of contract. AECI asserted that, knowing of the Employee's restraints, IPL has intentionally induced the Employee to breach them, by making and maintaining its offer to employ him.

[76] However, AECI's argument paid scant attention to the elements of the tort of inducing breach of contract. AECI contended that it was sufficient to demonstrate an arguable case that, knowing of the restraints, IPL intentionally induced the Employee to breach them by making and maintaining its offer to employ him.

[77] The gravamen of the tort is proof of particular knowledge and intention. The elements of the tort were authoritatively summarised in *Daebo Shipping Co Ltd v The Ship Go Star* (2012) 207 FCR 220 at [88]-[90] per Keane CJ, Rares and Besanko JJ in these terms (emphasis added):[25]

> 88. The tort of inducing a breach of contract consists of the following elements:
>
> (1) **there must be a contract** between the plaintiff (or applicant) and a third party;
>
> (2) **the defendant** (or respondent) **must know that such a contract exists**;
>
> (3) **the defendant must know** that **if the third party does, or fails to do, a particular act**, that conduct of the third party **would be a breach of the contract**;
>
> (4) **the defendant must intend to induce or procure the third party to breach the contract** by doing or failing to do that particular act;
>
> (5) **the breach must cause loss or damage to the plaintiff**.
>
> 89. The gravamen of the tort is the defendant's intention to induce or procure the breach in the knowledge that such a breach will interfere with the plaintiff's contractual rights: *Allstate Life Insurance Company v Australia & New Zealand Banking Group Ltd* (1995) 58 FCR 26 at 43A-C per Lindgren J with whom Lockhart and Tamberlin JJ agreed; *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473 at [159]-[171] per Sheller, Stein and Giles JJA; *LED Technologies Pty Ltd v Roadvision Pty Ltd* (2012) 199 FCR 204 at [40]-[54] per Besanko J with whom Mansfield and Flick JJ agreed. As Lindgren J explained, the defendant must have "a fairly good idea" that the contract benefits another person in the relevant respect. He said that knowledge of the contract may be sufficient for the purpose of grounding the necessary intention to interfere with contractual rights, even though the defendant does not know the precise term that will be breached. Reckless indifference or wilful blindness can amount to knowledge for this purpose: *Allstate* at 43C-44F; *Fightvision* at [171]; *LED* at [54].

[78] The word "knows" is a strong word. It means considerably more than "believes" or "suspects" or even "strongly suspects".[26] Knowledge imports a level of certainty, which may be distinguished from suspicion or belief.[27] Although the acknowledgment in *Daebo* and the cases cited by it that reckless indifference or wilful blindness may amount to knowledge for the purpose of proving the tort is important, it is equally important to note that negligence or even gross negligence is not sufficient to establish liability.[28] In *OBG Ltd v Allan* [2008] 1 AC 1, Lord Hoffmann observed (at [39]) that to be liable for inducing breach of contract, you must actually realise that you are procuring an act which will have the effect of breaching the contract, and if you did not actually realise that fact, it would

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25 *Daebo* was cited with apparent approval in *Civic Video Pty Ltd v Paterson* [2016] WASCA 69 at [30] per Newnes JA, with whom McLure P and Corboy J agreed.

26 *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd* (2003) 214 CLR 514 at [30].

27 *QBE Underwriting as managing agent for Lloyds Syndicate 386 v Southern Colliery Maintenance Pty Ltd* (2018) 97 NSWLR 459 at [95].

28 *LED Technologies Pty Ltd v Roadvision Pty Ltd* (2012) 199 FCR 204 at [50] per Besanko J, with whom Mansfield and Flick JJ agreed; *Swick Nominees Pty Ltd v Leroi International Inc (No 2)* (2015) 48 WAR 376 per Buss and Murphy JJA and Edelman J.

not matter that you ought reasonably have done so. Moreover, his Lordship observed (at [43]):

> On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been "targeted" or "aimed at".

[79] There was evidence before me that AECI informed IPL of the terms of the restraint applicable to the Employee. Although it is not entirely clear, that seems to have occurred on the same day, but after, the Employee accepted IPL's offer of employment. But knowledge merely of the fact and terms of the restraint is not sufficient to found the tort. I have explained the nature of the knowledge and intention which is requisite to establish the commission of the tort. There is no evidence that IPL had the requisite knowledge and intention before the contract of employment was formed. And any knowledge and intention after that time was formed in circumstances in which IPL's view, based on its legal advice, was that the proposed employment would not infringe the restraint.

[80] On the current evidence, the suggestion that IPL had the knowledge and intention which would support the suggested tort case seems to me to be speculative. I am not persuaded that AECI has established a prima facie case for enforcement as against IPL on the basis of a threatened commission or continuation of the tort of inducement of breach of contract.

The balance of convenience

[81] As I have observed, the second inquiry is whether the balance of convenience supports the relief claimed; in other words, whether the inconvenience or injury which the applicant would be likely to suffer if an injunction were refused outweighs, or is outweighed by, the injury which the respondent would suffer if an injunction were granted. The adequacy of an award of damages is to be considered as part of this inquiry.

[82] It is appropriate to focus only on the first restraint.

[83] For its part, AECI submitted:[29]

> The balance of convenience strongly favours the granting of interlocutory injunctive relief. Confidential information, once lost, cannot usually be recovered.[30] If an injunction is wrongly declined, AECI will be deprived for some period of the protection that the restraints afford its business, during which time its business might suffer permanent damage. The jeopardy to AECI from declining the injunction is great.[31] [IPL], and its subsidiary Dyno Nobel, are competitors of AECI.
>
> …
>
> Damages are an inadequate remedy for the reasons given in *EzyDVD Pty Ltd v Lahrs Investments Qld Pty Ltd*[32] and *Emeco International Pty Ltd v O'Shea (No 2)*.[33]

[84] IPL's case on balance of convenience was conveyed in the following evidence:

> 54. Once [the Employee's] employment commences, [the Employee] will develop a plan to support the Expansion Strategy and present that plan to IPL's leadership group for approval. Once the plan is approved, IPL will set targets and goals to support [the Employee's] plan for the Expansion Strategy.
>
> 55. In the event that [the Employee's] employment is unable to commence on Monday 13 July 2020, IPL's Expansion Strategy will be delayed and IPL will not be able to commence the planned expansion.

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29 Footnotes in original.

30 *John Fairfax Publications Pty Limited v Birt* [2006] NSWSC 995 at [45].

31 Cf *Otis Elevator Co Pty Ltd v Nolan* [2007] NSWSC 593 at [30].

32 [2010] 2 Qd R 517 at [26], [27].

33 (2012) 225 IR 471 at [21], [22].

> 56. My expectation is that the Expansion Strategy would generate at least $1 million in revenue in the first 12 months after [the Employee's] employment commences, and between approximately $500,000 to $5 million in earnings over the next three years.

[85] The Employee's case on balance of convenience was conveyed in the following evidence:

> 10. Opportunities for employment at my level of seniority are limited within the explosives industry.
>
> 11. My long tenure in the explosives industry would make it difficult to gain meaningful employment in any other industry. My age is such that any break in employment in the explosives industry would be detrimental to my future employment prospects.
>
> 12. I am married with two adult children. My residence is located just outside Brisbane City and both my children reside in Australia.
>
> 13. My wife is employed in Brisbane City and while my wife contributes financially, I am her primary financial support.
>
> 14. Both of my children are employed in Australia. One of my children is an Officer in the Australian Defence Force based in Townsville and the other is a doctor at the Royal Prince Alfred Hospital in Sydney.
>
> 15. The Australian Government, in response to the Coronavirus pandemic, have imposed a ban on overseas travel. It is unclear when this ban will be lifted. I am required to physically remain within Australia even though the effect and benefit of my work for [IPL] will be felt outside of Australia.

[86] The evaluation of the balance of convenience is not straightforward.

[87] AECI's submission, recorded above, focusses on what would happen if confidential information were misused, but it does not seek to restrain the misuse of confidential information. Rather, it seeks to restrain that which might provide the opportunity for misuse of confidential information. The only evidence of a threat of actual misuse of confidential information is the fact of the proposed employment, and the Employee's subjective misunderstanding of the proper construction of the clause. There is no evidence that either respondent would breach the clause once they had been informed of its ambit. A likelihood of suffering the injury which would follow consequent upon actual misuse of confidential information has not been established. That said, AECI was prepared to pay a significant sum (namely one year of the Employee's salary) for the right it seeks to vindicate. The injury which it would likely suffer would be a denial of that right, with the result that an occasion for misuse of confidential information would exist which would not otherwise exist. I reject the proposition that the damage it will likely suffer is great: it is the loss of a right which the parties had agreed was worth one year of the Employee's salary. There is, however, an unquantifiable risk that the possible misuse against which it had bargained might nevertheless occur and, in that case, I would accept that the loss which might be suffered would be significant and very difficult to quantify.

[88] IPL's evidence is put at a high level of generality. Given the level of generality employed, I do not find IPL's proposition to be particularly persuasive. It is hard to see, without more, why delay in employment of an employee not yet employed could really give rise to the posited delayed revenue stream. That would suggest that there was no one else in the organisation capable of being deployed to the posited task, or that the Employee's absence is not otherwise capable of being mitigated by having someone else do the planning concerned. Without more detail as to why that might be so, I am not persuaded to give much weight to the assertion that plans and profits would necessarily be delayed. I would, however, conclude that the injunction would cause some degree of harm, which is difficult to quantify, to IPL by way of disruption to its contemplated plans.

[89] For his part, the Employee focusses on the fact that being taken out of the industry for one year could cause him unquantifiable harm because it would adversely affect his employment prospects. The proposition that he would suffer harm of that nature is easy to accept. Its impact on a natural person would be significant, although ameliorated by the

fact that he has already been paid two thirds of a year's salary for that outcome, and the final third would have to be paid later in the year. So upon analysis, the harm would be the harm to his employment prospects after the expiry of that year. But the Employee must be taken to have considered that harm when he entered into his bargain with AECI.

[90] If I ignored the question of the strength of the prima facie case against each respondent, I would find that the balance of convenience supported the grant of orders enforcing the first restraint. Failing to enforce the first restraint would mean that AECI would have been denied a valuable right for which it had partially paid, and whilst the Employee might suffer harm to his employment prospects, he had effectively already valued that harm and must be taken to have priced it into the consideration which he was paid for the restraint. Although the right to damages would be a partial recompense to AECI for the loss of that right, it does not seem to me that it would be adequate recompense.

Which course carries the lower risk of injustice?

The second constraint

[91] In light of my conclusion that there is no prima facie case established in relation to the validity or enforceability of the second restraint, then the conclusion to be drawn in relation to this restraint is clear. Dismissing the application carries the lower risk of injustice.

The first constraint

[92] My conclusion that, given the nature of the rights asserted and the practical consequences likely to follow from the orders sought, AECI has not demonstrated a sufficient probability of success to justify the conclusion that it had established a prima facie case, was informed by a consideration of which course carries with it the lower risk of injustice. Dismissing the application against the Employee carries the lower risk of injustice.

[93] The Employee and IPL also suggested that delay was a discretionary consideration which favoured dismissal of the application.

[94] IPL submitted that AECI had delayed nearly three months in bringing this application, not filing until 8 June 2020 despite knowing since 13 March 2020 that the Employee had accepted an offer of employment with IPL. IPL suggested, and I agree, that in that period of time, with appropriate directions, the matter could have been finally heard and determined.

[95] I make the following observations:

(a) AECI's solicitors wrote to the Employee on 18 March 2020 threatening an application if an undertaking was not given before 30 March 2020. No undertaking was given.

(b) Indeed, AECI was told by IPL by email dated 26 March 2020 of the nature of the role and IPL's view that the restraint would not be infringed and that both IPL and the Employee would respect his confidentiality obligations. IPL invited discussions, but not in circumstances which suggested that it would concede the point.

(c) There were online discussions between AECI and IPL on 22 April 2020, at which AECI repeated its statement about pursuing enforcement.

(d) The next step was AECI sending letters of demand to the Employee and to IPL on 16 May 2020. The responses communicating that the demands were rejected were dated 21 May 2020 (IPL) and 2 June 2020 (the Employee).

[96] AECI submitted that the time it took in exploring the possibility of avoiding litigation should not be counted as delay. I am unpersuaded. It seems to me that by the end of

March 2020 there had been a sufficiently clear assertion of rights and failure to comply that AECI should have taken the necessary steps to enforce what it asserted were its rights. The relevant period of delay ran from the beginning of April 2020 until 8 June 2020, when the proceeding was commenced. The fact of this delay is a discretionary consideration against the grant of the relief sought and goes to reinforce my conclusion that the application should be dismissed.

Conclusion

[97] AECI's application is dismissed.

[98] The parties are directed to file and serve written submissions on the question of the costs order which should be made within 14 days. That question will be determined on the papers.