SUPREME COURT OF QUEENSLAND

CITATION:	*Artcraft P/L v Chandler* [2003] QSC 102
PARTIES:	**ARTCRAFT PTY LTD** ACN 004 399 642 (applicant) **v** **GLENN CHANDLER** (respondent)
FILE NO:	S2511 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	22 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2003
JUDGE:	Muir J
ORDER:	**The application is dismissed with costs to be assessed on the standard basis**
CATCHWORDS:	TRADE AND COMMERCE – RESTRAINT OF TRADE – VALIDITY AND REASONABLENESS – whether a restraint clause in an employment agreement is reasonable in extent and duration – principles applicable to determination of reasonableness of restraints *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 *Bridge v Deacons* (1984) 2 WLR 837 *Buckley v Tutty* (1971) 125 CLR 353 *Dewes v Fitch* (1920) 2 Ch 159 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 *Geraghty v Minter* (1979) 142 CLR 177 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 *Gledhow Autoparts v Delaney* [1965] 1 WLR 1366 *Lindner v Murdock's Garage* [1950] 83 CLR 628 *Littlewoods Organisations Ltd v Harris* [1977] 1 WLR 1472 *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548 *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991]

IRLR 214 (CA)
Peters (WA) Ltd v Petersville Ltd (2001) 205 CLR 126
Scorer v Seymour-Johns [1966] 1 WLR 1419
Woodmason's Melrose Dairy Pty Ltd v Kimpton [1924] VLR 475

COUNSEL: A A J Horneman-Wren for the applicant
G C Martin SC for the respondent

SOLICITORS: Macrossan Lawyers for the applicant
Phillips Fox for the respondent

The nature of the proceedings

[1] In these proceedings, commenced on 18 March 2003, the applicant seeks to restrain the respondent from acting as an employee of one of its competitors, Roadsigns and Marketing Supplies Pty Ltd ("RMS") and from being employed by "any other entity directly in competition with the business of the applicant". The claim is made in reliance on a restraint clause in an employment agreement entered into between the parties on about 1 November 2001.

[2] RMS is a major competitor of the applicant in New South Wales and Victoria and is in the process of expanding its operation into Queensland.

The restrictive covenant and other relevant contractual provisions

[3] The restraint clause provides –

> "17. **EMPLOYMENT BY COMPETITORS**
>
> In consideration of specialised training and information being provided to you in the course of your employment with Artcraft Pty. Ltd., the Company requires you to undertake a 'non-compete' agreement.
>
> Following the termination of your employment with Artcraft, except in the case of redundancy, the employee agrees to not engage whether alone or jointly, as an employee or as a principal partner, agent, director, servant or consultant, with any entity directly in competition with the business of the Company in the State of Queensland for a period of 6 months after termination."

[4] Clause 3 of the agreement provides that the respondent is "engaged on a monthly basis" and that either party may terminate the agreement by one month's notice in writing.

The applicant's business

[5] At the date of the agreement the core business of the applicant was the manufacture and sale of traffic signs, traffic control and road safety equipment. It also manufactured and sold workplace safety signs. A website maintained by it in early March 2003 listed a wide range of products manufactured or otherwise dealt in by it. They included: regulatory signs, hazard signs, street name signs, recreational signs, guide posts, safety lights, safety tapes, construction site signs, hazchem signs, speed humps, rumble bars, first aid and emergency signs.

[6] The website advertised that a division of the appellant designs, manufactures and sells park and street furniture such as litter bins, seats, tables and "urban furniture". Evidence disclosed that this aspect of the applicant's business was located in Adelaide and has recently ceased to operate.

[7] The great majority of the signs sold by the applicant are for use on or in relation to public roads but mining companies in central Queensland are substantial customers as is Telstra.

[8] Mr Young, the Queensland manager of the applicant, explained that the applicant's major customers in its core business were the Queensland Main Roads Department, some other State Government departments and the approximately 120 local authorities in Queensland. He identified the largest private sector customers as BHP Billiton Ltd and large civil contractors such as Leightons Ltd and Abigroup Ltd. The applicant carries on business in other States and has its main office in Melbourne. Mr Young, who is located in Brisbane together with most of the applicant's 85 Queensland employees, is in charge of the applicant's Queensland operations. The respondent answers directly to him.

[9] According to Mr Young, the applicant, in its core business, has one major and two minor competitors in Queensland. A former manager of the applicant's Townsville Branch identified another significant competitor, but the evidence does not reveal how the volume of its relevant business compares with that of the minor competitors named by Mr Young. Significantly more businesses compete with the applicant in its building signage activities.

[10] The applicant has a branch office in Townsville which was "set up as a self-contained unit" in about 1996. Its manager is, and was at relevant times, responsible for customer services in the area of the State north of Sarina. Sales within that area are the responsibility of the branch but there is noting to prevent customers such as Main Roads and Queensland Rail from placing orders for goods with sales or customer services staff in Brisbane. The respondent however, does not recall providing services for a customer in Brisbane for the supply of goods within the Townsville branch's territory. Also, the part of Queensland south of the southern extremity of Mackay and north of the southern extremity of Bundaberg is serviced by a designated sales representative who also has primary responsibility for customer services within his territory. Consequently, the respondent's contact with customers in this latter area was quite limited.

The applicant's way of doing business

[11] Most of the contracts for the supply of goods entered into by the applicant with local authorities and Government departments result from the winning of public tenders. Neither the respondent nor members of his section were involved in the preparation of tenders or, for that matter, in the preparation of quotes for major contracts in other than a peripheral way.

[12] With some of its larger customers, the applicant has contracts for the sale of specified products at a fixed price for a specified period. Some, or possibly most, of these contracts were entered into consequent upon a public tender process. In order to administer them the customer services division would be given price lists for the goods the subject of the contracts and would price the goods ordered in accordance

with the list. The duration of such contracts varies but six months was a normal term.

The history of the respondent's employment with the applicant

[13] The agreement does not mention the capacity in which the respondent was to be employed. At the time it was entered into he had been employed for about a year as the head of the applicant's customer services section in Brisbane. He remained employed in that capacity until his employment ceased.

[14] He commenced his employment in 1989 with the previous owner of the applicant's business. The applicant acquired the business in about 1995 and the respondent became employed by it. He was appointed the head of its customer services section in about 1996. From 1997 to 2000, until returning to his former position, he was a travelling sales representative with a territory extending from North Brisbane to Bundaberg and encompassing Cunnamulla and Charleville in the west.

The role of the customer services section and of the respondent as its manager

[15] The function of the customer services section is to take and process orders for goods, give quotes for individual products or small quantities of product and handle complaints. The respondent had authority to quote for sales up to a value of $5,000, whereas the authority of the other members of the section was limited to $2,000 to $3,000.

[16] The respondent's role as manager included the supervision of the three other persons in the section and, like other members of the section, he normally serviced particular customers. One of them was the Brisbane City Council. As part of his role in that regard, the respondent called at the Council's Stafford depot most days of the week on his way to work to pick up new orders and to make deliveries of ordered goods.

[17] The section did not engage in any external sales, marketing or promotional activities. By and large, the employees of customers with whom the members of the section dealt were employed in the customers' stock departments. Such persons played no role in the tendering processes or in awarding substantial contracts.

[18] The respondent received no formal training in the course of his employment by way of attending external courses or seminars and there does not appear to have been any formal or structured internal training sessions. Any "training" received by him was the result of experience gained by him in carrying out his duties.

Credibility

[19] I accept that the three witnesses who gave oral evidence attempted to provide honest accounts of the matters in question. I formed the distinct impression however that Mr Young tended to exaggerate the respondent's role, status and knowledge of the applicant's affairs. I consider also that his involvement in the litigation and his attempts to stem what he perceives as the damage potentially caused by the respondent's defection prevented him from making objective assessments and appropriate concessions. On the other hand, the respondent approached his evidence in a straightforward way and had no difficulty in accepting propositions adverse to his interests. I consider his evidence to be generally reliable.

Applicable legal principles

[20] It was common ground that clause 17 of the agreement is a covenant in restraint of trade and void unless the applicant is able to show that it was reasonably necessary for the applicant's protection. There was no suggestion that the restraint is unreasonable with reference to the interests of the public.

[21] The following passage from the judgment of Gibbs J in *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd*,[1] usefully explains the test of reasonableness.

> "The test to be applied in determining the validity of a restraint of trade was stated by Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd*, in a passage that has been cited with approval in many cases including, to name only recent decisions, *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd*. and *Buckley v. Tutty* . Lord Macnaghten said:
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> > 'All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.'
>
> The requirement that the restriction be reasonable in the interests of the parties has been explained as meaning that the restraint "must afford no more than adequate protection to the party in whose favour it is imposed" (*Herbert Morris Ltd. v. Saxelby)*, or in other words, 'does the restriction exceed what is reasonably necessary for the protection of the covenantee?' (*McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society Ltd*)." (footnotes omitted)

[22] In *Bridge v Deacons*,[2] the Judicial Committee propounded a test in these terms –

> "The proper approach is that adopted by Lord Reid in the *Esso Petroleum* case (1968) A.C. 269 at 301, where he said:
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> > 'I think it better to ascertain what were the legitimate interests of the appellants which they were entitled to protect and then to see whether these restraints were more than adequate for that purpose.'"

[23] In determining whether the restraint is reasonable in the interests of the parties it is relevant that the parties have bargained at arms length on an equal footing.[3] It would

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1 (1973) 133 CLR 288 at 315.
2 (1984) 2 WLR 837. See also *Geraghty v Minter* (1979) 142 CLR 177 at 184.
3 *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd (supra)* at 316-317.

appear, however, from the judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ in *Peters Ltd (WA) Ltd v Petersville Ltd*[4] that little weight is to be attached to the consensual nature of the restraint.

[24] The validity of the restraint must be determined as at the date of the agreement imposing it[5].

[25] Warrington LJ in *Dewes v Fitch*[6] discussed the nature of the protection to which an employer is entitled as follows –

> "… the employer is not entitled to require protection against mere competition. What he is entitled to protection against is the use by the employee against him in his business of knowledge obtained by him of his employer's affairs and the influence acquired by him over his customers in the course of an ordinary trade, and, in the case of a professional man, over what is more commonly called his clients. Lord Parker puts it in this way: 'I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained.'"

[26] Some further elaboration of the nature of the protection to which an employee is entitled is given in the following passage from the reasons of the Court in *Woodmason's Melrose Dairy Pty Ltd v Kimpton*[7], quoted by Kitto J with approval in *Lindner v Murdock's Garage* - [8]

> "There are many methods of enticing away customers beside the method of direct solicitation impossible of detection, and only known by results. But, apart altogether from any conscious exercise by the former employee of such knowledge and influence as he may have acquired in his former employment, the employer is entitled to protect himself against loss which may otherwise arise from the mere existence of a personal relation between his customers and his former servant. That relation, when resulting from the employment, is an advantage accruing to the employer and properly exercisable for his benefit so long as the service continues. The same relation would become a source of injury to the employer if the former servant were permitted to accept the custom which might voluntarily flow to him upon his opening an opposition business in the old locality. This danger is quite reasonably met, in our opinion, by a provision against serving the old customers for a limited period. The same reasoning is, we think, fully recognized by the common acceptation of a

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4 [2001] 205 CLR 126 at 142-143.
5 *Amoco Australia Pty Ltd (supra)* at 318 per Gibbs J.
6 (1920) 2 Ch 159 at 181
7 [1924] VLR 475 at 480, 481.
8 [1950] 83 CLR 628 at 655.

> covenant against carrying on a rival business at all in a given locality. Such a covenant has been repeatedly held to be reasonable, though it obviously has nothing to do with solicitation."

[27] The existence of other remedies based on breach of contract or tort for misuse of confidential information is not, of itself, sufficient reason to refuse the enforcement of a restrictive covenant.

[28] Denning MR, in *Littlewoods Organisations Ltd v Harris,*[9] observed in that regard –

> "It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade."

Is the restraint reasonable?

[29] The matters against which the applicant required protection were identified in the applicant's counsel's address as use by the respondent to the detriment of the applicant of his relationship with customers and the respondent's knowledge of the applicant's business. In the latter regard, the respondent was said to have knowledge of the pricing and profitability of the applicant's product lines.

[30] In written submissions, it was asserted that having regard to the nature of the product sold by the applicant and RMS, if the respondent went to work for RMS he would be dealing with entities which were customers of the applicant "and in those dealings … applying the knowledge he has of [the applicant's] commercial dealings with those customers".

[31] Other concerns were identified in affidavits sworn by Mr Young. They included: knowledge of the appropriate persons or officeholders to contact within local authorities; knowledge of sales strategies by virtue of attendance at management review and other meetings, knowledge of "the Henrob flush rivet system" and knowledge of the most and least profitable jobs undertaken by the applicant.

[32] The concern about the Henrob system may be disposed of briefly. It was already used by RMS before being used by the applicant in Queensland. Moreover, its use requires no particular expertise. Similarly, I have little doubt that any person possessed of a modicum of common sense, intelligence and business experience would readily ascertain the appropriate persons to contact within local authorities. Knowledge of sales strategies could be information of a type warranting protection but the evidence does not suggest that there was anything in the sales information within the respondent's knowledge which might be used to benefit a competitor or prejudice the applicant.

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9 [1977] 1 WLR 1472, 1479

[33] From the earlier discussion of the nature of the respondent's role as customer services manager, it is obvious that he possesses a knowledge of the applicant's product pricing and that he has formed business relationships with employees of the applicant's customers.

[34] I consider that the significance of the respondent's customer contact is overstated. What is of importance is the quality of the contact. The existence of the relationship between the respondent and the customers' employees in my view is irrelevant for present purposes unless it gives rise to an appreciable risk that, because of their employees' relationship with the respondent, customers will transfer allegiance to his new employer or give that employer orders which otherwise would have gone to the applicant. The relevant consideration was expressed in the following terms in *Herbert Morris Ltd v Saxelby*[10] -

> "Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer … as would enable him, if competition were allowed, to take advantage of his employer's trade connexion … "

[35] In my view, the level at which the relevant contact occurred (or as at the contract date was likely to occur) was such as to be quite unlikely to influence the outcome of tenders. That is determined by matters which the respondent had no capacity to influence such as price, quality of product, availability of stock and ability to effect timely delivery. Nor does the evidence disclose that the relationship would pose a risk that RMS might, because of the relationship, secure small orders that would otherwise have gone to the applicant. Even in those cases, price, quality and availability of stock are the major factors affecting sales. Other significant considerations are general trading reputation and the degree of attachment of customers as a result of an established trading relationship, for example.

[36] Persons in the position of the applicant build up links with customers' employees as part of the process of ensuring courteous efficient and friendly service. Such relationships are capable of generating additional business only insofar as they assist in maintaining the employer's reputation for reliability, efficiency and courtesy. But it does not follow that the mere existence of these links or relationships creates the opportunity for the employee to take advantage of them in order to benefit a new employer.

[37] The evidence does not disclose that the respondent had a role in determining prices by reference to profit margins and the like when dealing with quotes for relatively small quantities of product. Also, as I have said, there is no reason to suppose that success in obtaining contracts of this nature was not also largely determined by price and other considerations independent of the respondent. Consequently, the respondent's ability to harm this aspect of the applicant's business would seem to depend on the respondent's possession of and ability to use or divulge pricing and costing information not otherwise available to a competitor.

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10 [1916] 1 AC 688 at 709 per Lord Parker of Waddington.

[38] I accept the respondent's evidence that a great deal of information about price is either in the public arena or readily ascertainable by competitors of the applicant. Where a contract results from a public tender process, as is often the case with the applicant's major contracts, the prices for the relevant goods will tend to be ascertainable by the applicant's competitors. In other cases, persons in the position of the respondent are often able to learn of their competitor's prices through enquiries of the purchaser. Based on his industry experience, the respondent expressed the opinion that his counterparts in the employ of the applicant's customers would have a knowledge of the applicant's pricing similar to his. He also denied being "given access to the broader strategic information in respect of profitability margin (and) cash flow" and having knowledge of the cost of raw materials.

[39] Price lists supplied by the applicant to members of its customer services division, in respect of contracts providing for the sale of products at a fixed price for a specified period, show prices which, being determined by the outcome of tenders, vary from customer to customer. Such lists, on occasions, comprise about eight pages and cover some 60 products. Recollection of the details of prices of significant numbers of products without access to the price lists would pose obvious difficulties. Moreover, the contracts normally have a duration of no more than six months.

[40] There was no clear evidence of how knowledge of prices in existing or expired contracts could give an advantage to a competitor when competing for new contracts.

[41] More importantly, I do not accept that the respondent acquired knowledge of the applicant's cost structures or the profitability of its product lines to any significant degree. Nor do I consider it likely that the respondent would have retained a substantial amount of information in this regard that was accurate or of material use to a competitor. Information about the profit margins on product lines was peripheral to the respondent's every day activities and, as such, was not likely to have been absorbed by him in any detail or to any significant degree.

[42] For the above reasons I do not accept that the restraint imposed by clause 17 is reasonable or that it is no more than adequate for the protection of the applicant. A little support for this conclusion is, I think, to be gained from the introductory words of the clause. They seek to justify the restraint on the artificial basis of prospective "specialised training" and "specialised information". it would seem that at the date of the agreement the applicant lacked confidence that the restrictive covenant could be supported on other bases. Also, the notice period and remuneration level may be thought to provide some indication of the importance of the respondent's services to the applicant[11].

[11] c.f. *Gledhow Autoparts v Delaney* [1965] 1 WLR 1366

The area of restraint

[43] The respondent argues that the covenant is too broad as he had no contact with any customers of the applicant north of Sarina. The applicant seeks to support the geographical width of the restraint by arguing that the applicant's Queensland branch does business in the whole of Queensland. It points also to the fact that some of its customers such as Queensland Government departments and authorities have a statewide presence.

[44] If the restraint could be supported by the need to protect the applicant from the prospect that the respondent might divulge or make use of his knowledge of the applicant's profitability and pricing, it could hardly be said that the area of the restraint was too broad. Although there is no direct evidence on the point, I can infer from the evidence, and in particular from the nature of the applicant's business, that at the date of the agreement the applicant's competitors were likely to operate throughout Queensland or in substantial parts of it.

[45] If the respondent's knowledge of the applicant's profitability and pricing, if divulged to a new employer, had the potential to damage the applicant's business or afford a business advantage to a competitor of the applicant, a restraint in respect of the whole of Queensland would be justified unless it could be shown that there were areas of the State in which the applicant had and was likely to continue to have no competition. As the earlier discussion about the nature of the applicant's business shows, information about pricing and profitability will tend to have a relevance which, for the most part, is not limited to a particular location in the State.

[46] It is otherwise where the restriction is sought to be upheld in reliance on the employee's customer connection. The justification for such a restraint is the potential for the employee's relationship with the covenantee's customers to cause a transfer of those customers' allegiance. Accordingly, a restraint on that basis cannot be justified if it extends to an area in which the employee had no contact with customers.[12]

[47] Where what is sought to be protected by the covenant relates only to customer connection, if the customers are readily identifiable there may be difficulty in justifying a restraint based on area rather than a non-solicitation of customers.[13] It was said by Slade LJ in *Office Angels Ltd v Rainer-Thomas and O'Connor*[14] that –

> "…in considering the reasonableness or otherwise of a covenant such as this, the Court is entitled to consider whether or not a covenant of a narrower nature would have sufficed for the covenantee's protection: compare also *Scorer v Seymour-Johns* [1966] 1 WLR 1419 at p1427 per Salmon LJ."

[48] The applicant is assisted by the fact that some of its customers, such as State Government departments, operate throughout the State. If it could be shown that, as at the date of the agreement it was in the reasonable contemplation of the parties that the respondent would develop a relevant relationship with employees of such customers, a restraint in respect of the whole of the State would be sustainable. By a "relevant relationship", I mean one which might cause a customer to give business

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12 See *Scorer v Seymour-Johns* [1966] 1 WLR 1419

13 *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] IRLR 214 (CA).

14 *(supra)* para 50.

the nature of that conducted by the applicant to the respondent or his new employer or which might otherwise assist the new employer to obtain the business from the customer[15].

[49] In my view, however, the weight of the evidence is that any relevant relationship developed between a person in the respondent's position and employees of such companies had and was likely to have no bearing on the entering into of contracts for the supply of the applicant's product outside the area of the State serviced from Brisbane. Consequently, the restraint if supportable only on the employee protection ground would impose a restriction greater than was reasonably necessary for the protection of the grantee and would fail.

Conclusion

[50] It was contended also on behalf of the respondent that as "the specialised training and information" referred to in clause 17 was not provided there was a failure of consideration and the covenant is unenforceable. I consider that the argument lacks substance. As I have found the covenant unenforceable for other reasons, it is unnecessary for me to discuss it further.

[51] For the above reasons, the subject covenant is unenforceable and the proceedings will be dismissed with costs to be assessed on the standard basis.

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15 see eg., the matters discussed by Kitto J in *Lindner v Murdock's Garage* [1950] 83 CLR 628 at 654