SUPREME COURT OF QUEENSLAND

CITATION:	*Auto Parts Group Pty Ltd v Cooper & Ors* [2015] QSC 155
PARTIES:	**AUTO PARTS GROUP PTY LTD** ACN 065 899 176 (applicant) **v** **MYRETTA COOPER** (first respondent) **BRYAN DOIG** (second respondent) **STERLING PARTS (QLD) PTY LTD** ACN 155 400 105 (third respondent)
FILE NO:	BS 4768/15
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	5 June 2015
DELIVERED AT:	Brisbane
HEARING DATES:	3 June 2015 – 4 June 2015
JUDGE:	Bond J
ORDERS:	**The orders of the court are:**

1. **The applicant is to file and serve a form of order reflecting these reasons for judgment on or before 9 June 2015.**
2. **If any respondent disagrees with the applicant's proposed form of order, then that party is to file and serve any proposed form of order on or before 12 June 2015.**
3. **On or before 17 June 2015, each party is to file and serve such written submissions as they wish with respect to the proposed form of order, including any submissions as to costs.**
4. **The proceeding is to be listed for further hearing on any outstanding matters arising from the proposed forms of order and submissions at 9.15am on 19 June 2015.**
5. **Filing of the proposed forms of order and submissions is to take place electronically to my Associate**

6. Until the forms of order are finalised in accordance with the previous orders:

(a) the first and second respondents are restrained from attending any premises operated or maintained by the third respondent;

(b) the first and second respondents are restrained from communicating with that company or any agent representative employee or related entity of that company other than for the purpose of obtaining legal advice or as may be necessary for the conduct of the proceeding;

(c) the parties have liberty to apply on 24 hours notice.

CATCHWORDS: TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – RESTRAINTS OF TRADE – VALIDITY AND REASONABLENESS – PARTICULAR CASES – EMPLOYMENT – where the applicant was involved in the sale of automotive parts - where the first and second respondent were employed by the applicant – where the first and second respondents' contracts of employment included a restraint clause – where the first and second respondents were subsequently employed by the third respondent – where the applicant alleged that the third respondent was a competitor – where the applicant alleged this was a breach of the first and second respondent's contract of employment – where the respondents alleged that the clause was unreasonable and unenforceable – whether the first and second respondent were in breach of their previous contracts of employment – whether the restraint of trade clause was reasonable

COUNSEL: N Ferrett for the applicant
M Smith for the first, second and third respondents

SOLICITORS: Milner Lawyers for the applicant
Bennett Carroll Solicitors for the first, second and third respondents

Introduction

[1] The applicant, Auto Parts Group Pty Ltd, ("APG") is a company engaged in the importation and wholesaling of automotive parts. It has been in operation over 20 years and has offices in Queensland, New South Wales and Victoria and a State Distributor in South Australia.

[2] APG exports to Asia and the South Pacific. It sells to approximately 13,000 customers in Australia, 5,900 of which are across Queensland. Of those Queensland customers, twenty-five percent account for the vast majority of sales and are regarded as key customers.

[3] The third respondent, Sterling Parts (Qld) Pty Ltd, ("Sterling") is a company which is also engaged in the importation and wholesaling of automotive parts. APG claims Sterling is its competitor in that business.

[4] The first respondent, Ms Cooper, was, until her employment ceased on 13 March 2015, APG's state manager for Queensland. On 23 March 2015, she commenced employment with Sterling, as a manager in its sales team.

[5] The second respondent, Mr Doig, was, until 8 April 2015, APG's assistant state manager for Queensland. On 13 April 2015, he commenced employment with Sterling as a "parts interpreter", a role the meaning of which I will shortly explain.

[6] In this proceeding APG seeks –

(a) to enforce restraint clauses in the respective employment contracts of Ms Cooper and Mr Doig; and

(b) declarations and injunctions against them aimed at preventing the possibility of misuse by them of APG's confidential information.

[7] APG initially sought injunctive relief against Sterling, but ultimately did not pursue any claim for relief against it. APG nevertheless contends that Sterling was a proper party to the proceeding.

[8] Sterling, Ms Cooper and Mr Doig had common representation before me.

[9] It is appropriate to turn now to an identification of the background facts.

Background facts

[10] Mr Campbell gave the principal evidence on behalf of APG. I found his evidence to be credible and reliable.

[11] Mr Campbell is the sole director and shareholder of APG. He is APG's managing director and primarily responsible for the operation of its business.

[12] Reporting to Mr Campbell is an operations manager based in Sydney. Each state office has a state manager who is responsible for the performance of APG's business in that state. They are assisted by assistant state managers who step into the shoes of the state managers when necessary, but otherwise take responsibility for the performance of APG's internal sales force. The senior sales role for each state is that of business development manager. The business development managers report to their respective state managers.

[13] APG sells an inventory of around 37,000 different automotive stock items. It sells:

(a) to auto parts retailers (referred to as the "wholesale" part of the business), and

(b) to auto trades businesses, such as panel beaters, mechanical workshops, radiator specialists and the like (referred to as the "trades" part of the business).

[14] APG markets its business by-

(a) direct mail to customers,

(b) direct telephone calls to customers; and

(c) sales representatives who call directly on the customers.

[15] Some customers are visited or contacted every week. Wholesale customers in the metropolitan area are visited or contacted every two months and outside the metropolitan areas they are visited or contacted every six months. Moreover, the evidence of Mr Campbell was that the state manager and the assistant state manager were expected to visit

customers sufficient to maintain the relationship between APG and the customer. This was addressed by Mr Campbell in his oral evidence:

(a) As a general proposition, in answer to cross-examination by the respondents' counsel (emphasis added):

> Q: **And who would you say your customers have their relationship with in your organisation?**
>
> A: **I have proven over the years that sales reps come and go, and the business keeps thriving.** Our trajectory – and I think the reason that we've been successful as a business unit, and this is part of what we've done to create culture and professionalism – is we promote where an adequate person is available from within. So I would say when we opened at our Melbourne branch, the person that headed that Melbourne branch as state manager was our Queensland second-in-charge at the time. **So I would say that the relationship exists with the state manager and the second-in-charge.** We sent him down to Melbourne. We gave him 18 months on the ground in Melbourne to visit client after client after client. These people are, you know, have a broad range of skills with – backed up by a very sophisticated data delivery system. And sales rep invariably just go in there and talk about the weather, unfortunately, and forget that they've got to sell**. State managers and 2ICs with client contact whether that be over the phone or whether that be a visit, get down to brass tacks, and they understand what a sales process is.** And that is we've got this offer, this is our offering, this is our value proposition, and how can we make it work for both of us.
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> Q: **So how often would you expect a state manager to visit a customer?**
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> A: **A state manager to visit a customer? It's up to the state manager's determination.**

(b) Second, again in answer to cross-examination by the respondents' counsel, by describing the process being undergone by Ms Cooper's replacement as state manager:

> Q: **Which of your major customers still need to meet the new state manager?** Don't give me their names but just approximate numbers?
>
> A: **Well, the new state manager – there would be – when we started the – started the course, I think, we've got 5900 customers. Twenty-five per cent of those are the vast majority of our sales. That's over 1000 customers. We have started with customers and stakeholders. In a number sense, I honestly do not know but we've created a plan for those that need contact in the external basis and those that need contact from an internal and can be covered off by telephone. As regard a percentage maybe three per cent** – you know – you know, he has the responsibility for running the state – he's, yeah, not a full-time sales rep. **The – as I said earlier, the advantage that we have with our – how we promote is we promote from within so there's a lot of credibility comes from a parts interpreter and I think in Myretta's case she was actually also part of the purchasing team at one stage so she is completely familiar with supply chain and how we do it. So there's a lot of kudos that comes from solving a person's problems for many years, providing a good quality of service for many years and then getting the opportunity for us to invest in them and the opportunity for – for them to gain greater responsibility and reward**. So some of that is short-circuited insofar as relationship because you've had a relationship for so long. Given, you know, the state manager and the 2IC are no longer within the organisation, I think it makes the existing state manager's job, given the lack of suitable candidates internally, a lot more difficult than what has historically been the case.
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> …
>
> Q: **Yeah. No. I understood there was three per cent to go. Is that correct?**
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> A: **No, no. Contact is only three per cent to date I would – I would guess.** I haven't – as I said, I don't have the exact numbers in front me but we have formulated a plan and we're delivering on that plan.

[16] Access to data about vehicle parts and specifications sufficient to ensure that stock items meet customer requirements is an important consideration within APG's industry. There is significant expertise involved in "interpreting" the particular requirements of the customer and matching those requirements with the appropriate selection or selections from available

products. Indeed, the role of "parts interpreter" is recognised as a distinct role in the automotive parts industry.

[17] Ms Cooper commenced employment with APG on about 20 August 2002, in a part-time office administration role. She had no knowledge of the automotive parts business when she commenced employment with APG. During her employment she was promoted internally so as to undertake purchasing roles and to work as a parts interpreter. In this regard, in 2009 APG paid for her to undertake a Certificate III traineeship in Automotive Sales-Parts Interpreting. She successfully obtained this qualification as part of her employment.

[18] Mr Campbell thought she demonstrated a capacity to develop good rapport with customers and that her roles had enabled her to develop a good and broad understanding of APG's products, its customers' demands for and uses of those products, and how APG sources its products.

[19] By a written contract of employment dated 26 July 2013, Ms Cooper agreed to undertake the role of Queensland assistant state manager for APG. Then by written contract of employment dated 11 November 2013, she agreed to undertake the role of state manager for Queensland. The contracts were in common form. It suffices to observe the following:

(a) Ms Cooper's base salary was $85,000 gross per year, excluding superannuation. There was a provision for a discretionary bonus related to net branch profit, capped at $50,000 per year;

(b) Ms Cooper was obliged to become familiar with and observe APG's policies and procedures as varied from time to time;

(c) the contract included a confidentiality clause which provided:

> **Confidentiality -** During the course of your employment you will become aware of certain information, which is regarded as confidential. This will include the names and addresses of clients, potential clients, suppliers, potential suppliers, discounts, information about the Company, its operators and financial affairs. It will also include all the information you acquire which relates to the Company's associated businesses, clients and suppliers business activities. All such information is and will be treated by you as "confidential information".
>
> You agree that such confidential information remains at all times the property of the Company and that you will not at any time disclose this information to any third party other than for the legitimate purpose of dutifully carrying out your obligations under this contract of employment, and on termination of your employment, such information shall not be used for any purpose which is contrary to the Company's best interest or in any action against the Company or its officers.

(d) the contract included a restraint clause which provided:

> **Restraint -** You will not during the Restraint Period in the Restraint Area:
>
> - Attempt in any manner to persuade a customer or supplier to cease dealing with or reduce dealings which that customer or supplier has customarily had or contemplated having with the Company
> - Carry on, advise, provide services to or be engaged, concerned or interested in or associated with or otherwise involved in any business activity that is competitive with any business carried on by the Company.
>
> The "Restraint Period" means the following period commencing immediately after termination of your employment:
>
> (a) 6 months, or if that is unreasonable;
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> {b) 3 months, or if that is unreasonable;
>
> (c) 2 months, or if that is unreasonable;
>
> (d) 1 month.

> The "Restraint Area" means the State in which you are employed.
>
> Each of the covenants contained in this clause resulting from each restraint period and each restraint area constitutes and is to be construed and will have effect as a separate, distinct, severable and independent provision from the other covenants (but cumulative in overall effect [sic].

(e) the contract included a severance clause which provided:

> **Severance -** If any clause or any part of a clause in this agreement is unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid or legal. If this is not possible then the clause (of [sic] where possible the offending part) is to be severed without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) of this agreement, which will continue in full force and effect.

(f) the contract included a no poaching clause which provided:

> **No Poaching -** You agree that you may not and that you may not cause a third party to, engage, employ, poach or induce the Company's personnel to enter into a contract for services or employment with you or a third party.

[20] Since September 2013, APG had a formal "Confidential Information Protection Policy" in place. I conclude that the terms of Ms Cooper's contract required her to become familiar with and to observe the terms of that policy. Moreover, Mr Campbell deposed to the fact (which I accept) that –

(a) the policy was published on APG's intranet web site and a hard copy is maintained at its Queensland head office; and

(b) the task list issued to managers (including Ms Cooper and Mr Doig) stated that it was the specific responsibility of the state managers and persons acting in that role to ensure that all company Policies were followed.

[21] I observe that the formal Confidential Information Protection Policy:

(a) recorded that APG operated in a highly competitive industry and to protect its business APG had to ensure it protected its confidential information;

(b) identified the nature of the information which APG regarded as confidential:

> APG's Confidential Information which are considered Trade Secrets include the names and addresses of clients, potential clients, suppliers, potential suppliers, discounts, information about the Company, its operators and financial affairs. It will also include all the information you acquire which relates to the Company's associated businesses, clients and suppliers business activities.
>
> In particular:
>
> - The Purchasing Department and Product Development staff are to maintain as Confidential all information relating to supply chains and all information relating to new products identified to be or in development;
> - The Marketing Department staff are to maintain as Confidential all stakeholder management issues and approaches as well as key marketing strategies. The Marketing Department also is responsible for protecting IP by ensuring that letters of authorisation are provided when Photos are provided for use by third parties. Information on the IP licence for marketing materials and the proforma for the use of photo letter are held on the Marketing Department's intranet area;
> - The Export and Mining Services Department Staff are to maintain as Confidential all their information regarding existing and potential customers and suppliers;
> - Travel arrangements and destinations of all Staff that travel are to be kept Confidential. Other Staff are not to be informed of where people are travelling to;
> - All Executive Team Meeting packs are to be maintained as Confidential;
> - Generally Sales Staff and Sales Representatives are not to disclose supply chain information to customers or others. Therefore these Staff have no need to have access to this information;

- The supply sources of all genuine parts are Confidential.

(c) outlined mechanisms for protecting Auto Parts Group's confidential information, including the provision of proforma letters of appointment and contractual terms, and proforma letters to be sent to ex-employees (who might be thought to be breaching the policy) and their new employers (who might be thought to be taking advantage of such breaches);

[22] Apart from their contractual duty to become familiar with, and to observe the terms of the confidential information policy and other company policies, the duties of state manager (and assistant state manager when acting in that role) included:

(a) management of the business unit;

(b) meeting sales budgets;

(c) control of costs with a view to meeting profit expectations;

(d) managing staff, including recruitment and training;

(e) daily sales analysis;

(f) reviewing incoming goods shipment information;

(g) reviewing territory sales reports;

(h) reviewing profit and loss reports, particularly with respect to sales to budget, margins and expenses to budget; and

(i) monitoring the customer database on a daily basis.

[23] In late January 2015, APG's operations manager, Mr Smyth, developed some concerns about deficiencies in Ms Cooper's performance of her duties and responsibilities in her role as state manager. He met with Ms Cooper prior to 29 January 2015. By letter to Ms Cooper, dated 29 January 2015, he articulated those concerns.

[24] The letter stated:

> The purpose of this letter is to provide a warning in relation to the performance and conduct issues and to document a performance/conduct improvement plan for each item. As discussed, your performance will be reviewed again in relation to these specific issues on 28 February 2015. Continued poor performance/conduct or failure to implement the plan for each item may result in the termination of your employment.

[25] It also –

(a) identified five particular areas of performance and conduct which were of concern; and

(b) required Ms Cooper to prepare a draft warning letter to Mr Doig which was similar in structure to the letter sent to her.

[26] On 31 January 2015, Ms Cooper applied for a position with Sterling in response to an advertisement which Sterling had placed on a relevant website. On 2 February 2015, Ms Cooper took sick leave and ultimately did not return to work for APG. She provided doctor's certificates for 20 days sick leave. She interviewed for the job with Sterling on about 4 February 2015. She says that on about 13 February 2015 "to obtain some peace of mind with respect to the restraint clause" in her contract, she rang someone within the office of the Fair Work Ombudsman; read them the subject restraint clause; and had her mind 'put at ease' by what she was told concerning the likely enforceability of the clause. She tendered her resignation to APG by email on 15 February 2015 with effect on 13 March 2015. The email said she was "resigning due to personal reasons" (which, given the chronology, I find to be

a misleading proposition at best). On 18 March 2015, Sterling emailed her a written offer of employment and on 23 March 2015, she commenced employment with Sterling, as a manager in its sales team.

[27] The fact that Ms Cooper had gained employment with Sterling first came to Mr Campbell's attention on about 10 April 2015. Because he had the view that Sterling was APG's competitor, he immediately caused a letter to be sent to her which contended that her conduct amounted to a breach of the restraint clause in her APG contract of employment and which required her to defer her employment with Sterling until after the 6 month period in the restraint clause had expired. Mr Campbell sent a letter to Sterling pointing out that by employing Ms Cooper it was causing her to breach the terms of her contract of employment with APG.

[28] APG did not receive any response to either of these letters. Ms Cooper explained that she did not respond because she firmly believed that she was not in breach of her contract of employment. Mr Yang, on behalf of Sterling, explained that its lack of response was because Sterling did not think it was in breach of any duty.

[29] The chronology of events in relation to Mr Doig was as follows:

(a) he worked for APG as a parts interpreter between 19 January 2005 and 6 February 2007;

(b) he resumed employment with APG as a parts interpreter on 23 January 2008;

(c) in 2008, APG paid for him to undertake an apprenticeship during which he successfully undertook a Certificate III in Automotive Sales- Parts Interpreting. Following his completion of this apprenticeship, Mr Doig remained a full-time employee of APG as a parts interpreter;

(d) by a written contract of employment dated 12 November 2013, which contained the same Confidential Information, Restraint, Severance and No Poaching terms as that of Ms Cooper, Mr Doig agreed to carry out the role of assistant state manager for Queensland for a gross salary of $51,000 per year and a discretionary bonus based on performance and/or company profitability calculated at 0.25% of his individual net monthly sales;

(e) by written contract of employment dated 19 September 2014, which contract contained the same Confidential Information, Restraint, Severance and No Poaching terms, Mr Doig agreed to carry out the role of assistant state manager for Queensland for a gross salary of $55,000 per year and a discretionary bonus based on performance and/or company profitability calculated at 0.25% of his individual net monthly sales;

(f) on 3 March 2015, Mr Doig contacted Sterling to see if it was still hiring; on 7 March 2015 he interviewed with Sterling; and on 10 March 2015 accepted an offer of employment with Sterling as a parts interpreter;

(g) on 11 March 2015 he tendered his letter of resignation to APG, but lied to Mr Campbell and Mr Smyth about his reasons for resigning, telling them the false story that he and his wife had decided that he would become the full-time carer for their two children;

(h) he served out his notice period with APG and ceased employment on 8 April 2015;

(i) he commenced employment with Sterling on 13 April 2015.

[30] The fact that Mr Doig had gained employment with Sterling first came to Mr Campbell's attention on about 17 April 2015. Mr Campbell took essentially the same steps in relation

to Mr Doig as he took in relation to Ms Cooper, with essentially the same result and for the same reasons.

[31] As a consequence, APG commenced this proceeding on 13 May 2015, seeking in the first instance, interlocutory relief to preserve the status quo until a trial could be heard. The application for interlocutory relief was resolved by consent orders which provided that, upon APG giving the usual undertaking as to damages, until the completion of the trial, Ms Cooper and Mr Doig would not attend any premises operated or maintained by Sterling; nor communicate with Sterling or any of its representatives, except as was necessary for the conduct of this proceeding.

[32] From the outset of the hearing before me it was common ground between the parties that the issues were as follows:

(a) whether within the meaning of the restraint clauses Sterling's business was "competitive" with APG's business;

(b) whether the temporal extent of the restraint was reasonable;

(c) whether the geographic extent of the restraint was reasonable;

(d) the extent of access that Ms Cooper and Mr Doig had to APG's confidential information;

(e) the likelihood that, if not restrained, either or both Ms Cooper and Mr Doig would disclose confidential information to Sterling; and

(f) whether either of Ms Cooper and Mr Doig had already disclosed confidential information.

[33] The final issue may be disposed of first. In its closing written submission, APG accepted "that there was no hard evidence of past disclosure" and did not seek any such finding.

[34] It is otherwise convenient to analyse the issues which arise in this proceeding in the order in which the parties had identified them. Having done so, I will then consider the question of the form of the relief sought.

Are the two businesses "competitive"

[35] The relevant part of the restraint clauses required Ms Cooper and Mr Doig not to "… carry on, advise, provide services to or be engaged, concerned or interested in or associated with or otherwise involved in any business activity that is competitive with any business carried on by [APG]."

[36] Although awkwardly phrased in one respect - because one doesn't provide services to a business activity, one provides services to a person - I think the proper construction of this clause is a promise not to provide services to a person who carries on a business activity that is competitive with any business carried on by APG. The respondents did not contend to the contrary.

[37] As APG submitted to me, two questions arise: what is the proper construction of the prohibition and was it breached in this case.

[38] As to the first question, APG contends that two businesses are "competitive" with each other, in the sense contemplated by the restraint clause, if they participate in the same market, in the sense that:

(a) the two businesses sell goods that customers would regard as substitutable; and

(b) customers would discriminate between the goods on bases important to them (eg: price, quality).

[39] The respondents' submission did not separately consider the question of construction, but it seems implicit in their argument that their construction was that a business would be competitive only if it offered exactly the same products, to exactly the same customers. I do not see any reason why an objective third person standing in the shoes of the parties as at the time they entered into the contracts would have regarded "competitive with" in such a narrow fashion.

[40] I reject such a narrow construction, and instead I would adopt the broader construction proposed by APG.

[41] I turn now to the question whether in fact the prohibition, as I have construed it, was breached.

[42] The respondents' submission was that any claim for relief by APG founded on the contractual restraint clauses failed because APG and Sterling were not in competition.

[43] As initially formulated, the respondents' argument sought to justify that conclusion, at least partially, by reference to evidence from Mr Yang (who was the company secretary and a 40% shareholder of Sterling) that there were some parts which APG sold which Sterling did not sell. That argument was abandoned by counsel on behalf of the respondents. That left the argument that the two businesses were not in competition because:

(a) APG dealt almost exclusively in certified and/or genuine automotive parts and Sterling dealt almost exclusively in non-genuine, aftersales and/or uncertified automotive parts; and thus

(b) they should be regarded as operating in two discrete segments of the automotive parts market, one segment of which is certified and/or genuine automotive parts and the other which is non-genuine, aftersales and/or uncertified automotive parts.

[44] For its part APG pointed out that –

(a) both businesses were involved in the importation and wholesaling of automotive parts;

(b) there was a significant overlap in the product range of both businesses; and

(c) there was a significant overlap in the customer base of both businesses,

and asked me to conclude that Sterling carried on business activities which were competitive with APG's business.

[45] It seems to me that the contention advanced by APG is justified by the following evidence from Mr Campbell, none of which was challenged in cross-examination and all of which I accept:

(a) APG sells products under four brands:

(i) Motor Kool - radiator, condensers, fans and associated parts;

(ii) Genex - auto electrical parts and systems;

(iii) Rugged - steering and suspension including shock absorbers;

(iv) All Crash Parts - body related crash parts;

(b) Sterling competes in most of the areas in which APG carries on business, by selling products in the same categories as three of APG's four brands albeit without the same breadth of product or broad range of product lines.

(c) Examples include:

(i) Motorkool: Sterling sells radiators and fans in competition with APG, but has a much more limited range of products;

(ii) Rugged: Sterling sells steering and suspension products which compete with APG's Rugged range of products although they do not sell shock absorbers;

(iii) All Crash Parts: Sterling does compete with APG in this area, but the depth and breadth of its product offering is nowhere near that of APG.

[46] I reject the respondents' argument that the two businesses are not competitive in fact. I observe:

(a) Although Mr Yang did seek to support the proposed division of the market into two discrete parts, he did acknowledge that the two businesses must share customers and that there was "some cross-over in our market share". That latter concession by itself seems to me to be enough to disprove the respondents' contention.

(b) Mr Doig gave similar evidence which, although calculated to minimise the extent to which the two businesses were competitors, to my mind necessarily must be taken to acknowledge that the businesses were competitive in the relevant sense:

(i) "[APG's] list of customers is … very similar to [Sterling's] list of customers";

(ii) "Sterling … in many respects … is not a direct competitor";

(iii) "these are two distinct markets within the automotive industry with a small amount of cross-over".

(c) I also found as telling against my treating Mr Doig's evidence as reliable the fact that he was prepared to lie to APG about the reason for his resignation. Although he suggested that his motivation was a desire to avoid confrontation, I think it was more likely due to the fact that he well knew that APG took very seriously its concerns about protecting its confidential information in a competitive industry, that he knew he was going to work for a competitor, and that he knew that APG would react badly to this course. Accordingly, I would not give any weight to his subsequently expressed opinions concerning whether the two business were competitive.

(d) Ms Cooper's evidence was that "Sterling … is not a direct competitor of [APG] in the way suggested / implied in Mr Campbell's Affidavit, or at all." She based that opinion on her knowledge of the parts which both sell. But when the proposition was tested in cross-examination she immediately retreated from any contention that she was sufficiently knowledgeable of Sterling's parts list. That alone was sufficient to persuade me not to give any weight to her opinion. It also seemed to me that the reason she approached the Fair Work Ombudsman at the time she did was likely due to the fact that she well knew that she was subject to the restraint clause and, for the same reasons as Mr Doig, she well knew she was going to work for a competitor and knew that APG would react badly to that course. Accordingly, I would not give any weight to her subsequently expressed opinions concerning whether the two business were competitive.

[47] The result is that I find that both Ms Cooper and Mr Doig have contravened their promise as expressed in the restraint clause in their respective contracts that they would not provide services to a person who carries on a business activity that is competitive with any business carried on by APG. The critical question is whether the promise was enforceable by APG. That is the question to which I now turn.

Reasonableness of the temporal and geographic extents of the restraint

The law

[48] There was no dispute between the parties as to the law which was applicable to the assessment of the enforceability of the restraint clauses.

[49] With one qualification, it is sufficiently summarised for present purposes in the recent decision of Applegarth J in *Vision Eye Institute Limited v Kitchen* [2014] QSC 260 (citations omitted):

> [258] … The general principle is that a restraint of trade is prima facie invalid, but may be enforced if it affords no more than reasonable protection to the party in whose favour it is imposed and is not injurious to the public.
>
> [259] The party who seeks to enforce the restraint has the onus of proving that the restraint is reasonable as between the parties. The restraint must operate to protect a legitimate interest of the covenantee. The test is whether the restrictive covenant exceeds what is reasonable and necessary for the protection of the legitimate interest.
>
> [260] The reasonableness of the restraint is determined at the date of entry into the agreement. The issue is whether the agreement was a reasonable one to make at the relevant time, having in mind the best estimate the parties could make for the future. …
>
> [261] …
>
> [262] In what may be described as "employee cases", different interests are at stake to those that arise in the sale of a business. Subject to reasonable restraints to protect an employer's legitimate interests, an employee should be free to pursue a living in his or her chosen field. The principal interest which can be protected by a restraint against a former employee is the benefit of the former employer of the relationships with its customers. In general, restrictive covenants restraining an employee will be scrutinised more strictly than covenants in relation to the sale of a business. A restraint upon a former employee may be reasonable if it allows a replacement employee to establish a connection with customers and thereby protect the employer's goodwill. One test is to ask how long it will take the connection between the ex-employee and the customer to die away.
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> [263] ...
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> [264] …
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> [265] ....
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> [266] The fact that the parties agreed to the restraint and that the contract acknowledges that the restrictions are reasonable is some evidence of their reasonableness, particularly where the parties bargain from a position of equality. An acknowledgement of reasonableness should be given appropriate weight. This is because the parties are taken to have a good knowledge of the relevant industry and are in a better position than the court to assess what amounts to reasonable protection. However, a declaration by a party that a restraint is reasonable does not bind the court.
>
> [267] Provisions in a restrictive covenant may be severed if they are capable of being regarded as divisible and deleted without materially modifying the effect of what remains. In addition, the parties may expressly provide that each obligation has independent operation and is severable.
>
> [268] Courts will not rewrite the parties' contract for them. However, within certain limits which are not alleged to have been exceeded in this case, a contract may contain cascading restraint of trade clauses.

[50] The qualification which I would make to the observations in the passage just quoted concerns His Honour's indication in [262] that "the principal interest" which can be protected by a restraint against a former employee is the benefit of the former employer of the relationships with its customers. I accept that the interest identified is necessarily an important interest, but it seems to me that in particular cases it may well be just as important a basis to uphold a restraint clause that it is necessary to protect the employer's interests in its trade secrets and confidential information.

[51] Indeed, that such an interest might be an interest which justified reasonable protection was acknowledged in both the cases which his Honour cited at [262] of his reasons. Thus:

(a) In *Pearson v HRX Holdings Pty Ltd* (2012) 293 ALR 554 at [47], the Full Court of the Federal Court quoted with approval from the Canadian case of *Elsley v JG Collins Insurance Agencies Ltd* [1978] 2 SCR 916 at 925–8. Amongst other things, the passage quoted contained the following (emphasis added):

> In the leading case of *Morris v Saxelby* [1916] 1 AC 688 Lord Parker enunciated with clarity the circumstances in which a covenant taken by an employer from an employee or apprentice will be enforceable. He said, at 709:
>
> > **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**.

(b) See also the reference to the importance of protecting the employer's interest against unfair use by the former employee of information gained during the period of service in *Lidner v Murdock's Garage* (1950) 83 CLR 628 at 636.

[52] I note also that in *AGA Assistance Australia Pty Ltd v Tokody* [2012] QSC 176 at [27] to [32], McMurdo J also concluded that the interest in protecting confidential information which an employee might have was also an interest which could justify an appropriate restraint clause.

[53] The only other observation which I would make as to the law is that it is clear that although the question of the validity of the restraint is to be decided as at the date of the agreement imposing it, that does not mean that reasonableness must be assessed only by the facts which then existed. What might be reasonably assessed as at the date of entry into the contract as likely to happen in the future is also relevant to assessing the nature of the interests to be protected and what might be reasonable to protect them: see *Vision Eye Institute Limited v Kitchen* at [260].

<u>The interests of APG which were worthy of protection</u>

[54] APG contended that it had established the existence of interests which warranted protection, namely the risk of disclosure of confidential information and the risk of exploitation of relationships with customers developed in the course of employment by APG.

[55] As to confidential information:

(a) APG submitted, and I agree, that at the time that they signed the respective contracts, both Ms Cooper and Mr Doig knew that APG jealously guarded its confidential information. A formal policy was in place and the effect of their contracts was that it was part of their duty to become familiar with it and comply with it.

(b) Both contracts made specific reference to confidential information and intellectual property. Confidential information was specifically said, in each contract, to include "names and addresses of clients, potential clients, suppliers, potential suppliers, discounts, information about [APG], its operators and financial affairs. It will also include all the information you acquire which relates to [APG's] associated businesses, clients and suppliers business activities".

(c) The objective importance of this information as at the time of contracting is obvious. However, Mr Campbell explained why such information was important to the business of APG. I accept his evidence. In particular he gave evidence, which I accept, of the importance to APG of information concerning its supply chain:

> Over the 20 years of the operation of the business we have developed approximately 20 supply chains which I would describe as "hidden chains". What I mean by that is that these are supply chains that we have developed to import auto parts in a cost efficient way by minimising the number of entities that are involved in the distribution process. We have identified these suppliers by the extensive travel that I or other representatives of the applicant have undertaken over the last 20 years and the contacts made during these travels. These are suppliers who do not publicly advertise, and cannot be found on public internet web sites. They are suppliers who are prepared to sell auto parts directly to us while bypassing the usual distribution channels that may otherwise increase the cost of acquiring the parts.
>
> The names of these suppliers and the contact details for them would be extremely useful for our competitors because it identifies cost effective supply sources that I have taken 20 years to establish.

[56] As to the risk of exploitation of relationships with customers developed in the course of employment by APG:

(a) The respondents contended that there was no evidence that Ms Cooper or Mr Doig serviced particular customers or had contact with them.

(b) The proposition that there was no such evidence cannot be accepted.

(c) As to Ms Cooper:

(i) During the more than 10 year period in which she was employed by APG preceding her 2013 promotion to the position of assistant state manager, Ms Cooper worked in administrative positions, but also in purchasing roles and as a parts interpreter.

(ii) Mr Campbell thought Ms Cooper showed a capacity to develop good rapport with customers and that her roles enabled her to develop a good and broad understanding of APG's products, its customers' demands for and uses for those products and how APG sources its products.

(iii) I infer that during this period she must have developed relationships with and knowledge concerning APG's customers. Mr Campbell explained how that occurred in the passage of transcript which I have quoted at [15] above.

(iv) Moreover, as assistant state manager and then as state manager it was part of her role to foster relationships with clients. Again, Mr Cambpell explained that in the passage of transcript which I have quoted at [15] above.

(d) The evidence of Mr Campbell to which I have referred in relation to Ms Cooper is just as relevant to Mr Doig. He too was a parts interpreter before he became assistant state manager. And as assistant state manager, it was part of his role to foster relationships with clients.

[57] Ultimately the view I take of the evidence is that the conclusion which McMurdo J made about the evidence in *AGA Assistance Australia Pty Ltd v Tokody*, should also be made by me in this case in respect of both Ms Cooper's contract and Mr Doig's contract:

> [32] The [employer] has established the existence of interests which warranted some protection, namely that the risk of the use of the connections between the [employee] and particular clients and the use of information as to the [employer's] dealings with those clients, including the terms of contracts with them and information affecting the relative profitability of dealings with them. Those

> matters represent advantages which the [employee] could bring to a new employer which, in the relevant sense, could be said to belong to the [employer] because they were acquired for the benefit of the [employer] in the course of [the employee's] employment by it. Whilst the [employee] remained employed by the [employer] under the contract, it was likely, as at the date of the contract, that [the employee] would continue to have or further develop such connections with clients and to accumulate further relevant knowledge in relation to them. The likelihood of those matters was a factor which existed at the date of the contract, so that the scope of what could be protected extended beyond what was then known by [the employee] and the relationships which by then [the employee] had developed.

Reasonableness of the temporal extent of the restraint

[58] The temporal restraint is stated in terms of what is often called a "cascading restraint of trade clause", but as Applegarth J noted in *Vision Eye Institute Limited v Kitchen* in language which is also apposite to the present case "… within certain limits which are not alleged to have been exceeded in this case, a contract may contain cascading restraint of trade clauses."

[59] APG contended that the evidence justified the conclusion that 6 months was reasonable in the circumstances.

[60] The respondents contended that the restraint sought to be imposed upon Ms Cooper and Mr Doig is more than was adequate for the protection of APG and ought not be enforced.

[61] First, the respondents suggested that there was no basis for any protection because there was no evidence that either individual could provide a new employer with any significant advantage that they had obtained during the course of their employment with APG and no evidence that either could use their personal connection with customers or suppliers to influence them. It will be apparent from my reasons thus far, that I reject that contention. In any event, I point out that personal connection is not the only interest which may be protected by a restraint clause.

[62] Second, the respondents suggested that if any temporal restraint was regarded to be reasonable it should be the 1 month period identified in the cascade, not the 6 month period for which APG contended.

[63] In my view, assessed as at the time of contract, a 6 month restraint would be regarded as reasonable:

(a) Mr Campbell deposed that "it will take at least 6 months to establish relations between our new state manager and Assistant State Manager and our customers and stakeholders".

(b) The time which would be taken in re-establishing relations was developed in cross-examination of Mr Campbell: see the passage of transcript which I have quoted at [15].

(c) Although that evidence describes events after the date of contract, in my view it is likely that as at the date of entering into the contracts, the parties would inevitably have appreciated that the task involved would have been similarly time intensive;

[64] In my view in assessing the reasonableness, as at the time of entering into the contract, the parties would bear in mind the extent to which the restraint might have the potential to sterilise the employee's opportunity to earn a living. It seems to me that this consideration is relevant to the question of whether the restraint is reasonable as between the parties. Some authority suggests that whether or not it was reasonable in the interests of the parties, a clause which completely negated the opportunity of an employee to earn a living would be regarded as unreasonable in the interests of the public: see *Chitty on Contracts* (31st ed, Sweet & Maxwell) at 16-106. But on either view, I do not find that the clause in this case has that effect. APG submitted, and I agree, that the skills developed by Ms Cooper and Mr Doig would have been regarded, as at the time of contract, as transferrable to other jobs, including

at the retail level within the automotive parts industry, and more generally within other fields requiring, administrative, management and sales experience.

[65] I find that the 6 month temporal restraint was reasonable.

Reasonableness of the geographic extent of the restraint

[66] The restraint clause made it plain that the restraint area was the whole of Queensland.

[67] The respondents submitted that the geographical extent of the restraint as drafted was too wide because there was no evidence that either Ms Cooper or Mr Doig had had contact with customers throughout Queensland.

[68] APG on the other hand submitted:

(a) Its business is operated on a state-by-state basis.

(b) Mr Campbell's evidence established that the state manager and assistant state manager were expected to establish and maintain customer relationships across the entire area of their responsibility.

(c) At the time of contracting, the parties must have known the facts of how the business was conducted and what was expected of state managers.

[69] I accept APG's submissions. Given the employees' seniority within the organization, their knowledge of the way in which the business worked and the geographical extent of their managerial responsibility, I am persuaded that I should find that the geographical extent of the restraint was reasonable.

Conclusion

[70] For the reasons I have articulated, I find that the restraint clause is enforceable as against Ms Cooper and Mr Doig.

Extent of access to confidential information and apprehension of disclosure

[71] I have already noted that APG no longer seeks a finding that either Ms Cooper or Mr Doig has in fact breached their contractual obligation to maintain confidentiality in APG's "confidential information" as defined in the contracts.

[72] The question arises whether there is sufficient justification to make orders against them to address the risk that they might do so in the future, if not restrained.

[73] I accept APG's submission that the Court should intervene to restrain a breach of the duty to maintain confidentiality if there is a real and sensible possibility of the misuse of the information: cf *Australian Leisure and Hospitality Group v Stubbs* [2012] NSWSC 215 per Nicholas J at [26].

[74] It is plain that Ms Cooper and Mr Doig had access to confidential information in the categories to which their contract referred.

[75] So far as Ms Cooper is concerned:

(a) As a participant in the monthly "board" meetings, Ms Cooper would usually have had access to information which included:

(i) the top 10 customers across the 4 brands including information as to gross sales and profitability;

(ii) financial performance of the business;

(iii) identity of business to business customers and the amounts they spend,

(iv) identity of export customers;

(v) product development information;

(vi) a 6-month view of Auto Parts' supplies including an analysis of orders, supply dates and new products;

(vii) business plans and other strategic information;

(viii) reviews of relationships with stakeholders;

(b) in her oral evidence she acknowledged getting the relevant pack of information by email prior to the meetings, which evidence was contrary to the tenor of her affidavit evidence;

(c) both she and Mr Doig had access to computer systems at a higher level than general employees to enable them to do their jobs and, accordingly, to information including a range of customer data which, if supplied to Sterling, would enable it to approach customers with knowledge as to the customers' particular product interests.

(d) I would not attribute significant weight to Ms Cooper's disclaimers of having had access to that information. I do not regard her evidence as reliable. In particular:

(i) I have already mentioned my concerns regarding her attribution of her reasons for resigning.

(ii) I have already mentioned my concerns regarding her evidence as to whether Sterling was competitive with APG.

(iii) I agree with APG's criticism of the evidence which she gave concerning the circumstances of her approaching the Fair Work Ombudsman. In this regard, Ms Cooper gave evidence in cross-examination that she took no documents with her when she left. It was suggested to her that she had at least taken her contract with her. That was denied. That was in apparent conflict with her second affidavit, where she gave evidence that she had read the relevant clause from the contract to an employee of the Fair Work Ombudsman. When it was pointed out that her evidence in the affidavit was that she read out the actual clause, she adapted her answer to say that she had read an identical clause from a friend's employment contract. I did not find that to be persuasive.

(iv) I also found troubling her evidence - when confronted with the near identity of language between paragraphs 48 – 50 of her first affidavit, and paragraphs 41 – 43 of Mr Doig's first affidavit - that the paragraphs in her affidavit represented her own words. She sought to explain away the plagiarism on the basis that they were "stock standard answers within the industry". That seems unlikely.

[76] So far as Mr Doig was concerned:

(a) Mr Doig swore that he did not have access to the information in the packs which preceded the monthly board meetings.

(b) On the other hand:

(i) I have already mentioned my concerns regarding his false articulation to APG of his reasons for resigning.

(ii) Mr Doig deposed that he "did not have any access to the identity or the contact details of those suppliers", but conceded in cross-examination that he did have access at least to their identities and acknowledged to receiving reports identifying suppliers by names.

(iii) When he was confronted in cross-examination with the co-incidence between the language used in relevant parts of his and Ms Cooper's affidavits, he insisted that the language in his affidavit was his, having been previously written out by him, at home, but did acknowledge that he and Ms Cooper had "discussed it beforehand". I think it is unlikely that the language was his.

(c) I do not regard Mr Doig's disclaimers of having had access to relevant information to be reliable either.

[77] It is appropriate to turn now to the question of whether there is real and sensible possibility of the misuse of the information if Ms Cooper and Mr Doig are not restrained. It seems to me that their conduct in dealing with APG is at least to be regarded as discreditable. They understood the import of the restraint clause and the importance with which APG regarded the need to maintain confidentiality of information to which they had access, yet separately they chose to keep from APG the fact that they had sought and obtained employment with a competitor. When that is weighed in the balance with –

(a) the view that I have formed of the unreliability of their evidence; and

(b) the fact that the terms of their respective contracts with the competitor offer bonuses for sales results,

I think that is sufficient to give rise to the requisite real and sensible possibility of misuse of confidential information.

[78] I find that they should be the subject of injunctions restraining them in an appropriate manner.

The form of relief

[79] As against Ms Cooper, APG sought the following relief:

(a) An order that, until 14 November 2015, she be restrained, whether by herself, her agents or representatives:

(i) whilst working within the State of Queensland, from persuading a customer or supplier of the applicant to cease dealing with or reduce dealings which that customer or supplier has customarily had or contemplated having with the applicant;

(ii) within the State of Queensland, from carrying on, advising, providing services to, being engaged by, being concerned in, being interested in or associated with or otherwise involved in any business involving the importation and sale to retailers or trade customers of automotive spare parts.

(b) A declaration that by her contract of employment dated 11 November 2013, she is precluded from disclosing to any party:

(i) the name of any supplier of goods or services to the applicant and information kept by the applicant with respect to such a supplier including the address, trading history and means by which goods are obtained from the supplier;

(ii) the name of any potential supplier identified by the applicant;

(iii) the name of any customer of the applicant or any information kept by the applicant with respect to such a client including the address, trading history and credit history;

(iv) the name of any potential client identified by the applicant; any information with respect to the financial or business affairs of the applicant;

(v) any information with respect to goods or services supplied or acquired by the applicant, including any pricing information and discounts;

(vi) any information obtained by the applicant with respect to any of its customers or suppliers obtained in circumstances requiring that such information be treated confidentially; and

(vii) any compilation of information falling into the categories set out in this paragraph.

(c) An order that she is permanently restrained, whether by herself, her agents or representatives from disclosing information of a kind contemplated by paragraph (b) above.

[80] As against Mr Doig, APG sought the following relief:

(a) An order that, until 14 November 2015, he be restrained, whether by himself, his agents or representatives:

(i) whilst working within the State of Queensland, from persuading a customer or supplier of the applicant to cease dealing with or reduce dealings which that customer or supplier has customarily had or contemplated having with the applicant;

(ii) within the State of Queensland, from carrying on, advising, providing services to, being engaged by, being concerned in, being interested in or associated with or otherwise involved in any business involving the importation and sale to retailers or trade customers of automotive spare parts.

(b) A declaration that by his contract of employment dated 1 September 2014, he is precluded from disclosing to any party:

(i) the name of any supplier of goods or services to the applicant any information kept by the applicant with respect to such a supplier including the address, trading history and means by which goods are obtained from the supplier;

(ii) the name of any potential supplier identified by the applicant;

(iii) the name of any customer of the applicant or any information kept by the applicant with respect to such a client including the address, trading history and credit history;

(iv) the name of any potential client identified by the applicant;

(v) any information with respect to the financial or business affairs of the applicant;

(vi) any information with respect to goods or services supplied or acquired by the applicant, including any pricing information and discounts;

(vii) any information obtained by the applicant with respect to any of its customers or suppliers obtained in circumstances requiring that such information be treated confidentially; and

(viii) any compilation of information falling into the categories set out in this paragraph.

(c) An order that he is permanently restrained, whether by himself, his agents or representatives from disclosing information of a kind contemplated by paragraph (b) above.

[81] APG also sought an order that the respondents pay its costs of the proceeding including any reserved costs.

[82] So far as the form of relief are concerned:

(a) APG seeks to have the 6 month period of the restraint commence from the date it commenced this proceeding.

(b) That does not seem to me to be appropriate. For each employee there was a period prior to that date when they were no longer paid by APG, but not yet paid by Sterling. In the exercise of my discretion I would regard that period as a period which should be taken into account for each of them, in effect, as time during which they have complied with their restraint. It would in each case reduce the temporal period of the injunction.

(c) In Ms Cooper's case that is the period from about 13 March 2015 to about 23 March 2015 and in Mr Doig's case that is the period from about 8 April 2015 to 13 April 2015.

(d) The first part of the injunction based on the restraint should be against "attempting to persuade" not "persuading".

(e) The second and fourth subparagraphs of the declaration in each case should not be made in their present form. I think they are too ambiguous.

[83] I make the following orders:

(a) APG is to file and serve a form of order reflecting these reasons for judgment on or before 9 June 2015.

(b) if any respondent disagrees with APG's proposed form of order, then that party is to file and serve any proposed form of order on or before 12 June 2015.

(c) on or before 17 June 2015, each party is to file and serve such written submissions as they wish with respect to the proposed form of order, including any submissions as to costs.

(d) the proceeding is to be listed for further hearing on any outstanding matters arising from the proposed forms of order and submissions at 9.15am on 19 June 2015.

(e) filing of the proposed forms of order and submissions is to take place electronically to my Associate;

(f) Until the forms of order are finalised in accordance with the previous orders:

(i) Ms Cooper and Mr Doig are restrained from attending any premises operated or maintained by Sterling;

(ii) Ms Cooper and Mr Doig are restrained from communicating with Sterling or any agent representative employee or related entity of that company other than for the purpose of obtaining legal advice or as may be necessary for the conduct of the proceeding;

(iii) the parties have liberty to apply on 24 hours notice.