SUPREME COURT OF QUEENSLAND

CITATION:	*LCR Group & Anor v Bell* [2016] QSC 130
PARTIES:	**LCR GROUP PTY LTD ACN 095 626 798** (First Applicant) **AND** **CRANE AND HAULAGE PARTNERS HOLDINGS LIMITED ACN 608 139 215** (Second Applicant) **v** **JAMES ROBERT BELL** (Respondent)
FILE NO/S:	No BS2892 of 2016
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	10 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	18, 19, 20 May 2016
JUDGE:	Byrne SJA
ORDER:	
CATCHWORDS:	TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – RESTRAINTS OF TRADE – VALIDITY AND REASONABLENESS – PARTICULAR CASES – EMPLOYMENT – where the defendant was employed by the first plaintiff – where the first plaintiff was a subsidiary of the second plaintiff – where the defendant entered into a Shareholders' Agreement with the second plaintiff – where the Shareholders' Agreement contained a restraint clause –whether the restraint clause is valid and enforceable
COUNSEL:	K Howe for the applicants A Fraser for the respondent
SOLICITORS:	Rostron Carlyle Lawyers for the applicants Bennett Carroll for the respondent

Parties

[1] Until recently, the defendant ("Mr Bell") was employed by the first plaintiff ("LCR").

[2] For some years, LCR has operated as an industrial and mining services company, supplying what LCR's CEO, Mr Partington, calls "lift and shift" services, including bulk material handling, mobile crane hire, transport, mining and associated services.

[3] LCR is a subsidiary of the second plaintiff ("Crane").

Promise

[4] Mr Bell and Crane are parties to a Shareholders Agreement dated 31 July 2014 pursuant to which Mr Bell acquired a small shareholding in Crane. The Agreement contains a provision in restraint of trade:

> "**12. Restraint of Trade**
>
> **12.1 Definitions**
>
> In this clause 12, the terms below have the following meaning:
>
> **Restraint Area** means:
>
> (a) those geographical areas in which the Business operates from time to time;
>
> (b) each state or territory of Australia, and each other country, in which the Business operates from time to time;
>
> (c) Australia and New Zealand;
>
> (d) Australia;
>
> (e) Queensland;
>
> (f) New South Wales;
>
> (g) Victoria;
>
> (h) Tasmania;
>
> (i) South Australia;
>
> (j) the Northern Territory;
>
> (k) the Australian Capital Territory;
>
> (l) Western Australia;
>
> (m) New Zealand;
>
> (n) Papua New Guinea.
>
> This definition operates such that the Restraint Area incorporates all of the areas set out in paragraphs (a) to (m) above inclusive. If a court of competent jurisdiction considers that such area makes the restrictions at clause 12.2

unenforceable, one or more of the limbs described in paragraph (a) to (m) above will be removed from the definition of Restricted Area, but:

(a) only to the extent necessary to make the restriction in clause 12.2 enforceable; and

(b) only on the basis that areas furthest from where the Manager is employed or otherwise provides services to the Company Group are removed first.

Trigger Date means the later of:

(a) the date on which the Management Shareholder (including any Permitted Transferee) ceases to hold Shares; and

(b) the date on which the Relevant Manager ceases to be an employee of, or engaged by, the Company Group.

Restraint Period means the period:

(a) commencing on the earlier of:

(i) where the Manager is employed or engaged by a Company Group Member, the commencement date of that employment or engagement; and

(ii) the Manager or Management Shareholder's Admission Date; and

(b) ending on the date:

(i) …

(ii) in relation to all Managers and Management Shareholders, 12 months from the Trigger Date; or only if that period is held to be unenforceable;

(iii) in relation to all Managers and Management Shareholders, 9 months from the Trigger Date; or only if that period is held to be unenforceable;

(iv) in relation to all Managers and Management Shareholders, 6 months from the Trigger Date; or only if that period is held to be unenforceable;

(v) in relation to all Managers and Management Shareholders, 3 months from the Trigger Date.

12.2 Restraint of Trade

(a) … each Manager must not, and must procure that its Management Shareholder and its Affiliates must not, at any time during the Restraint Period and within the Restraint Area directly or indirectly, either on his or her or its own account or jointly with or on behalf of any other person, organisation or company (in any case whether as a director, employee, member or otherwise associated therewith):

(i) carry on, participate in, provide finance or services to, or otherwise be directly involved as a shareholder, unitholder, director, consultant, adviser, contractor, principal, agent, manager, employee, beneficiary, partner, associate, trustee or financier) in, a business activity that is substantially similar to, or

in competition with, the Business (as at the date of the conduct concerned or, in the case of a Manager who has ceased to be employed by the Company Group, as at the date on which the Manager ceases to be employed by the Company Group);

(ii) endeavour to entice away from any Company Group Member, offer to perform services for or otherwise solicit the custom of any client or customer of the Company Group which was or is a client or customer of the Company Group within the last or most recent 12 months of the Manager's employment with the Company Group (as the case may be);

(iii) interfere or seek to interfere with the relationship between any Company Group Member and its customers, clients, suppliers, distributors, officers, employees, contractors or agents in the conduct of the Business;

(iv) do or say anything harmful to the reputation of the Business or that may lead a person to stop, curtail or alter the terms of its dealings with the Business;

(v) represent themselves as being in any way connected with or interested in the Business;

(vi) seek employment with, accept employment with or perform services for any client or customer of the Company Group which was or is a client or customer of the Company Group within the last or most recent 12 months of the Manager's employment with the Company Group (as the case may be); or

(vii) offer employment or business opportunities to any employees of any Company Group Member or counsel, procure or otherwise assist any person to do so.

(b) A Manager must not at any time after the Manager ceases to either be employed by the Company Group or hold shares in the Company Group falsely represent himself or herself as being in any way connected with or interested in the Business.

(c) This clause 12 does not prohibit the Manager from having an interest in securities which are listed or quoted for trading on an internationally recognised exchange if the Manager does not have an interest in more than 5% the securities in the relevant entity…

12.3 Severance

(a) If any part of this clause 12 is found to be void, voidable, invalid or otherwise unenforceable it will be severed to the extent that it is void or to the extent of voidability, invalidity or unenforceability, but the remainder of that clause will remain in full force and effect.

(b) The parties intend that if any part of this clause 12 is found to cover a geographic area or to be for a length of time which is not permitted by applicable law, or in any way construed to be too broad or to any extent invalid, such part is not be construed to be null, void and of no effect, but to the extent that it would be valid and enforceable under applicable law, this clause 12 will be construed, interpreted or reformed to provide the maximum enforceable geographic area, time period and other terms

(not greater than those contained in this clause 12) that would be valid and enforceable under such applicable law.

12.4 Acknowledgements

Each Manager acknowledges that:

(a) it has received independent legal advice with respect to the provisions of this clause 12;

(b) the restraints contained in this clause 12 are reasonable in the circumstances and necessary to protect the goodwill of the Business and the Company Group and intend the restraints to operate to the maximum extent; and

(c) damages may not be an adequate remedy if there is a breach or a potential breach by the Manager or its Management Shareholder of its obligations under this clause 12 and if a breach by the Manager or Management Shareholder of its obligations under this clause 12 occurs, is threatened or in the opinion of Archer Investors or the Company is likely, the Archer Investors and the Company are immediately entitled to apply for injunctive relief."

[5] "Company Group" means[1] Crane and all its subsidiaries. "Business" means "the business carried on by the Company Group from time to time".[2] Mr Bell was a "Manager".

[6] Mr Bell has resigned from LCR and proposes to accept employment with one of LCR's competitors, Freo Group Pty Ltd ("Freo").

[7] Crane seeks to enforce, by injunction, the restraint in the Shareholders Agreement.

[8] The Shareholders Agreement also contained promises by all parties in these terms:

"**13.1 Confidentiality**

Subject to clause 13.2, each party must not do, and must use its best endeavours to ensure that its auditor, officers, employees, agents or advisers do not do, any of the following:

(a) disclose any Confidential Information;

(b) use any Confidential Information in any manner which may cause or be calculated to cause loss to the Company Group or the other parties or other than for the purpose for which it was disclosed; or

(c) make any public announcement or issue any press release regarding this Deed or the transactions contemplated by it.

---

1 By cl 1.1.
2 ibid.

13.2 Permitted disclosure

A party may disclose and may permit its auditor, officers, employees, agents and advisers to disclose, any Confidential Information:

(a) (Consent) with the consent of the Archer Investors…"

"**Confidential Information** means any information regarding:

(b) the assets, affairs or business of the Company Group;

(c) the Plan, this Deed or the transactions contemplated by it; or

(d) the Shareholders,

but does not include any information that has come within the public domain, other than as a result of a breach of confidentiality by any party."

[9] Crane does not conduct any business with goodwill or having any other interest meriting protection by the cl 12 restraint. However, the Defence does not allege that Crane cannot invoke cl 12 to protect the goodwill or confidential information of its subsidiary[3].

Strange pleadings

[10] The pleadings, on both sides, contain curiosities. Some matter.

[11] The Statement of Claim sets out material terms of cl 12 of the Shareholders Agreement. It then asserts that those "provisions of" the Shareholders Agreement "are each valid and enforceable", anticipating that Mr Bell would resist enforcement of cl 12 on the basis that it constituted an unlawful restraint of trade.

[12] The Defence did not contend that Crane had no interest that might lawfully be protected by the restraint, effectively admitting that Crane had such interests, without identifying them: it "denies that the provisions of the…shareholders deed are 'valid and enforceable' because the terms…relied on by the plaintiffs are: (i) in excess of what is reasonably necessary for the legitimate protection of the plaintiffs' business interests; and (ii) in particular, the geographical area … and the temporal extent of the purported restraint … are excessive and over-reaching…"

[13] That choice of words confined the case that cl 12 was not enforceable to the notion that, because of its geographical reach and temporal extent, the restraint was more than was reasonably required for Crane's protectable "business interests".

[14] The Reply denied that the "restraint provisions…exceed what is reasonably necessary for the legitimate protection of the Plaintiff's (sic) business interests…". But it does not state what those interests were. Instead, the Reply propounded just one factor to sustain the

---

[3] cf *Koops Martin v Dean Reeves* [2006] NSWSC 449, [78]; *Beckett Investment Management Group v Glyn Hall* [2007] EWCA Civ 613.

restraint: "the express acceptance and agreement to the reasonableness of those provisions contained in [cl] 12.4…" of the Shareholders Agreement, the terms of which were pleaded.

[15] In other words, Crane did not plead that there was goodwill or any other identified interest[4] to protect. Rather its case was that, by contract, Mr Bell had agreed that the restraint was reasonable, as if that admission or promise were the end of the matter[5].

[16] On the second day of the trial, Crane sought to expand its case beyond reliance on the cl 12.4(b) acceptance that the restraint was "necessary to protect the goodwill of the Business and the Company Group"[6] to contend that there really was goodwill related to customer connection that sufficed to sustain the restraint. Amendments to raise that new case were refused. However, amendments to the Statement of Claim were allowed to allege a protectable interest in confidential information.

First issue

[17] Is the cl 12 restraint enforceable?

[18] In other words, has Crane proved that, on 31 July 2014[7], the restraint was reasonably required to protect LCR's confidential information[8] from misuse by Mr Bell?[9]

Employment history

[19] Mr Bell was first employed by LCR in May 2006. Thereafter, for about five years, he managed LCR's operations in Central Queensland.

---

4 Such as confidential information.

5 See *Woolworths Ltd v Olson* [2004] NSWCA 372, [39]. The Reply also set up that Mr Bell was estopped from asserting that the restraint was unenforceable. The plaintiffs contended that Crane (i) would not have concluded the Shareholders Agreement with Mr Bell had he not represented that the restraint was necessary to protect goodwill; and (ii) would suffer detriment if he may now depart from that position, which would be unconscionable. That overly optimistic contention (see *Berry v Wong* [2000] NSWSC 1002, [25]-[26]; *Proactive Sports Management Limited v Wayne Rooney & Ors* [2010] EWHC 1087, [671]) was abandoned soon after the trial began.

6 The cl 12.4(b) acknowledgement concerning reasonableness of the restraint relates exclusively to goodwill. There is no acknowledgement that the restraint affords protection for confidential information.

7 "The validity of the restraint must be decided as at the date of the agreement imposing it": *AGA Assistance Australia Pty Ltd v Tokody* (2012) 224 IR 219, 229.

8 It is not in contest that, in principle, an employer's confidential information may be protected by a restraint against post-termination employment with a competitor: cf *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9, 14-15; *Zomojo Pty Ltd v Hurd (No 2)* (2012) 299 ALR 621, 673-674; and *Auto Parts Group Pty Ltd v Cooper* [2015] QSC 155, [50]-[53].

9 In the result, it is unnecessary to consider whether the cl 12.4(b) acknowledgement and other evidence sufficed to prove a protectable interest in customer connection: cf *Vision Eye Institute Limited v Kitchen* [2014] QSC 260, [266]. Incidentally, Mr Bell does not contend that the restraint was contrary to the public interest. Nor it is said to be unenforceable because of the variety of restraints for which cl 12 provides given the several stipulations of duration and geographical reach: R. Jackson, *Post-Employment Restraint of Trade*, (2014), 3.6, pp 50-54.

[20] In that role, he acquired information about LCR's capabilities in that region and the identity of its customers, existing and prospective.

[21] In January 2011, Mr Bell was employed in Chinchilla to develop the company's "SWQ Surat Basin Crane and Transport base", as Mr Partington describes things.

[22] From April 2011, Mr Bell worked for a while with a competitor before returning to LCR as "National Manager – Heavy Lift Services"[10].

[23] In September 2012, Mr Bell concluded a written contract of employment with LCR.

[24] Mr Bell was to report to the General Manager – Tower Crane Division for tower crane related activity and to the General Manager – Business Development for business development matters. His prescribed responsibilities included:

- Developing and implementing business strategies to build LCR's specialised heavy lift business across Australia;
- Working with both senior management and "Business Units" to identify, tender, secure and execute specialist heavy lift activities for major projects and clients across Australia;
- Positioning LCR as a leading provider of specialist heavy lift services and solutions throughout Australia;
- Leading and managing the business activities of the Queensland "Tower Crane Business", including "leading, motivating and managing business unit employees; developing and implementing strategic plans; ensuring operation of performance; managing the sales and marketing function and overseeing the administration function".

[25] By cl 21 of the employment agreement, Mr Bell promised to "keep secret during and after…employment all information…obtained about the business and affairs of the company or clients or customers".

[26] The agreement included[11] a post-employment restraint on performing work in competition with the part of LCR's business in which he has worked during the preceding six months[12]. Directly associated with that restraint was an acknowledgement by Mr Bell that he would acquire knowledge of confidential information about clients, suppliers and business methods:

> "**29. Post-Agreement Obligations**
>
> 29.1 You acknowledge and agree that:

---

[10] According to Mr Bell, although the agreement described his position as "National Manager, Heavy Lifting", he did not actually fulfil that role because of changes within LCR's structure.

[11] See cl 29.3(c).

[12] This restraint is not sought to be enforced. It is conceded that the absence of a stipulation of its geographical operation meant that LCR could not prove that it afforded no more than reasonable protection.

(a) in the course of your employment with LCR, you will:

29.1.1 have access to and knowledge of LCR's products, services, skills and techniques;

29.1.2 become acquainted with the clients and suppliers of LCR and their special needs and requirements;

29.1.3 become aware of the identity of prospective clients whose business LCR is attempting to attract;

29.1.4 generally be privy to Confidential Information concerning LCR, its clients, suppliers, and its methods of doing business; and

29.1.5 have access to and become aware of Intellectual Property owned by LCR

(b) the only effective, fair and reasonable manner in which the interests of LCR can be protected is by the restraints imposed in this Agreement;

(c) the duration, extent and application of the restrictions contained in this Agreement are no greater than is reasonably necessary to protect LCR's legitimate business interests, including the preservation of its relationships with its clients, suppliers, employees, agents, directors, officers, partners, contractors, advisors and consultants, the goodwill of its business, its Confidential Information and Intellectual Property…"

[27] Mr Bell began work under the employment agreement on 1 October 2012, initially managing LCR's Tower Crane business. That business was sold in November 2013. Mr Bell, as he describes things, "assisted with the new owner's transition through to March 2014".

[28] After the sale of the Tower Crane business, Mr Bell's employment was again subject to the terms of the 2012 employment contract.

[29] In March, April and May 2014, Mr Bell managed the logistics to put eight cranes on site in Darwin.

[30] From June 2014, he began a six month assignment acting as a Relief Manager on the Jellinbah/Yarrabee coal project: a mining services project, mainly involving coal haulage and stockpile management.

[31] At the end of July 2014, Mr Bell's employment contract remained in force.

[32] About a month before the Shareholders Agreement was made, John McCarthy, a solicitor said by Mr Partington to have been "acting for all shareholders", addressed prospective shareholders, including Mr Bell, to explain the ramifications of Crane's acquisition of LCR for them, including the opportunity to acquire shares in Crane.

[33] Mr McCarthy told Mr Bell and other participating LCR staff that, if they chose to become shareholders in Crane, "you will be signed up to a Shareholder's Agreement", and that:

> "As a shareholder, if you do leave the company and you sell your shares, you then are restrained from working for a competitor or investing in a competitor for 12 months after you leave. The restraint is very broad so you can't work for a competitor or another company that is in a substantially similar business."

[34] After the briefing, Mr Bell chose to become an "initial management shareholder".

Quality of evidence

[35] Much of the evidence relating to Mr Bell's acquisition of LCR's allegedly confidential information is not clearly directed to circumstances existing by 31 July 2014 or which then seemed in reasonable prospect[13]. Identifying the pertinent facts involves picking through Mr Partington's affidavits and testimony, as well as evidence of Mr Bell, trying to discover circumstances material to LCR's interest in such of its information as may have been protectable by the restraint in cl 12.

[36] Crane's case furnishes surprisingly[14] little detail about Mr Bell's knowledge of LCR's affairs as at 31 July 2014 or concerning the extent to which such information as had been imparted to him was truly confidential.

[37] An illustration of misspent effort involved in the failure to link information Mr Bell acquired to circumstances existing in July 2014 or then reasonably foreseeable appears in an affidavit of Mr Partington, where he deposes:

> "Jim Bell was personally and directly involving in pricing and negotiation of works with clients and others. He is aware of the terms of those works, including details of the agreed rates and fees to be paid and the equipment needs of that particular client. He became familiar with the key purchasing and negotiating officers from the clients. He also attained knowledge of the profitability…of the businesses through these clients and became aware of the extent of engagement required and the supervisory needs on various projects and jobs."

[38] Mr Partington testified but said nothing about the extent to which those assertions related to the situation that obtained by July 2014.

[39] There is also a difficulty about what the future likely held when the Shareholders Agreement was concluded. As Mr Bell's subscription for shares reveals, the parties then anticipated that he would continue to be employed in some capacity under the employment agreement after his work at Jellinbah/Yarrabee finished. But the evidence is silent about what his responsibilities might have been expected to be in the longer term

---

[13] cf *Auto Parts* at [53].

[14] The importance of identifying the detail is notorious: *Veda Advantage (Australia) Pty Ltd v de Beer* [2016] NSWSC 37, [49].

– an omission with potential to matter for predicting the nature of LCR's confidential information that Mr Bell may have acquired after 31 July 2014.

[40] On Mr Bell's case, Crane has not adduced enough evidence to show that the categories of information said to be confidential are reasonably capable of protection by contractual restraint: in particular, apart from a few miscellaneous documents tendered during Mr Bell's cross-examination, Crane chose not to put into evidence any document that is alleged to contain confidential information.

[41] There is force in that criticism. Skimpy indeed is the material touching the confidentiality of LCR's information that Mr Bell had acquired by 31 July 2014[15].

Paucity

[42] Mr Bell acknowledges that much of the emphasis of his employment with LCR over the years has been business development, including developing and implementing strategies to build LCR's specialised heavy lift business, as well as identifying and tendering for major projects. In Queensland, the Northern Territory and New South Wales, his responsibilities included valuation project opportunities and presenting prices to prospective customers. Mr Bell could not establish a heavy lift division for LCR. But his efforts did involve quoting, unsuccessfully, on projects. To develop heavy lift projects, by July 2014, Mr Bell must have received some of LCR's commercially valuable information, including about pricing and customers. The detail, however, is lacking.

[43] Mr Partington speaks of classes of information to which Mr Bell had "unrestricted access". But it is often unclear whether he is referring to information that Mr Bell had actually received as distinct from material that would have been available to him had he bothered to look for it.

[44] According to Mr Partington, Mr Bell had "unrestricted access" to "certain aspects" of LCR's Navision Accounting Systems, which are said to be the "full accounting systems" of LCR. However, different levels of access were available to staff. Crane supplied no details about Mr Bell's access let alone the extent to which he may have taken advantage of it[16]. Moreover, there is nothing to show that such information as Mr Bell may have acquired in his infrequent recourse to the systems was confidential.

[45] It is said that Mr Bell had "unrestricted access" to customer details, including key person details. Mr Bell accepts that he gained such knowledge by late July 2014. But there was no attempt to demonstrate that that information – none of it particularised - was not publicly available.

---

[15] The employment agreement does contain acknowledgements by Mr Bell concerning the kinds of information to which he would be exposed, and that the only reasonable manner in which LCR's interests could be protected was by the restraints that agreement imposed. In principle, such concessions can afford evidence of the reasonableness of a restraint against working for a competitor. But these acknowledgements relate to information that Mr Bell was to acquire as National Manager – Heavy Lift Services. By 31 July 2014, that role was finished; and there was no expectation that Mr Bell might assume that position again.

[16] Mr Bell probably accessed the System no more than three times.

[46] Mr Bell had used "quoting templates" by the time the Shareholders Agreement was concluded. Mr Partington described them as "in-house information modelling…prepared by our business units for pricing specific jobs and projects" that are not "readily available in the marketplace". If the templates did hold commercially sensitive information, their structure, content or method of use might have been expected to be explored in evidence. Yet no example was adduced. No mention was made of the degree of skill or effort needed to generate such a template. No attempt was made to prove that the template information could have been valuable to a competitor. And, as was submitted for Mr Bell, the label "quoting template" alone does not establish that what Mr Bell learned through these documents was really confidential, capable of protection by a restraint on post-termination employment.

[47] Still, it seems probable that information compiled to price projects for which LCR would be a competitive bidder would be closely guarded.

[48] "Tenders and pricing of project information" are relied on as information to which, at some unspecified stage, Mr Bell had access. Given the nature of LCR's business, and that it has had competitors, information about how it priced tenders could well be confidential information of significant value to a competitor. Again, however, there is no detail: just assertion.

[49] By July 2014, Mr Bell did have limited knowledge of LCR "pricing schedules". No such document was put into evidence. Nobody testified that these schedules were not widely disseminated outside the LCR Group: as, for example, by being posted on a publicly searchable website as information made available for prospective customers to consider.

[50] Mr Partington said that Mr Bell had access to "profit margins" by July 2014, claiming that he could not have performed his role under the employment agreement without that knowledge. Mr Bell did not have access to the part of the Navison system that generated reports on profit margin. But he did not deny that he had gained information about that sensitive topic from others who did have access to the Navison profit information. Such information would, it seems, have been confidential.

[51] Mr Partington says that Mr Bell had unrestricted access to "internal operational issues". No detail was provided. So there is no basis for supposing that the information to which he is referring - whatever it may be - was confidential.

[52] Mr Partington mentions that Mr Bell had unrestricted access to equipment specifications and capabilities. LCR's equipment is standard. Information about specifications and capabilities is public knowledge, disseminated by the manufacturers.

[53] Mr Bell was familiar with at least some of LCR's "pricing strategies", as Mr Partington called them, by the time the Shareholders Agreement was signed. Mr Partington also referred to "rate schedules (pricing lists)". None, however, was in evidence. Some Australian businesses publish price lists to inform and attract customers. There was no evidence that LCR does not do that with its "rates schedules (pricing lists)".

[54] Mr Bell did have access to "profit and loss" statements. Again, however, no evidence was adduced to show that that information was not disseminated publicly: for example, in compliance with legislative or regulatory requirements.

[55] There is a contest concerning Mr Bell's knowledge of LCR's "business…and strategic plans". Mr Bell says that he did not have access to such plans. Mr Partington testified that Mr Bell did have "access to company strategy plans" by July 2014. The conflict was not explored in Mr Partington's evidence-in-chief. He was not cross-examined. Mr Bell was cross-examined. Taxed with the suggestion that he knew of LCR's "strategy plans" before July 2014, Mr Bell answered: "I went to that strategy meeting in September 2014". With that obscure reference, there the topic was left.

[56] Mr Partington's evidence concerning strategic plans made available to Mr Bell did not descend to particulars. Nor was any document that may contain such a plan tendered. His evidence about those plans is largely conclusory assertion. It is not a satisfactory basis for a finding that Mr Bell was aware of the detail of LCR's strategic plans by July 2014.

[57] Strategic plans of some organisations are published to the world. It appears not to be controversial that LCR's strategic plans were secret, containing confidential information of potential advantage to a competitor: the strategies that LCR would use to "win business", as Mr Partington put it.

Duration

[58] In July 2014, it will have been anticipated that Mr Bell would be privy to commercially sensitive, confidential information during his continuing employment. But, with one exception, no evidence was directed to the length of time during which LCR's information could be expected to remain secret or commercially valuable. For example, there is nothing to show how long information about prices or profit margins would retain their currency[17].

[59] If all LCR's information was bound to lose such confidential character as it may have had, and therefore its commercial value, within a year of the commencement of the "restraint period", a restraint for as long as 12 months would necessarily afford more than reasonable protection to that interest.

[60] LCR's strategic plans are imparted to staff in confidence. Such a plan holds information which, were it to become known to a competitor, would have significant potential to damage LCR's and Crane's economic interests.

[61] LCR's strategic plans are developed triennially. A strategic planning exercise was planned when the Shareholders Agreement was concluded. That soon happened. In September 2014, Mr Bell attended the strategic planning meeting with senior general managers and other LCR staff.

---

[17] Or, if it matters, potentially advantage a competitor who learned of the information.

Area

[62] By the end of the addresses, there was no contest about the reach of geographical restraint following severance of some places.

Foresight

[63] On 31 July 2014, it was well on the cards that Mr Bell, in ongoing employment with LCR, would acquire some commercially valuable, confidential information of LCR. Indeed, that happened at the planning meeting a few weeks after the Shareholders Agreement was concluded. In whatever position with LCR he came to serve afterwards, Mr Bell would very likely learn of other confidential information the misuse of which would probably be detrimental to LCR's and Crane's economic interests.

[64] On 31 July 2014, Crane and LCR had a legitimate interest, deserving of protection from misuse, in whatever confidential information that Mr Bell had already acquired and which it could fairly have been anticipated he would acquire in future.

[65] At least some of that confidential information[18] was valuable material with a commercial life not so transitory as would make a 12 months restraint longer than was reasonably required to protect the information from disclosure or other misuse by Mr Bell.

[66] Despite the many deficiencies in the evidence in its case, in the result, Crane has proved that the protection of its confidential information justified the cl 12 restraint for a year after termination of Mr Bell's employment.

Enforceable

[67] The cl 12 restraint is valid and enforceable[19].

[68] The next issue is whether an injunction should be granted to enforce the restraint to the extent to which it is valid.

Enforcement?

[69] There is little in contest concerning remedy.

[70] It is not alleged that: (i) damages would be an adequate remedy[20]; (ii) Mr Bell would suffer hardship were he to be held by injunction to the cl 12 restraint; or (iii) promises in

---

[18] A strategic plan at any rate.

[19] It is not suggested that the promises relating to confidential information in the two agreements afford adequate protection to LCR's interests in its information such that a restraint upon post-termination employment would afford more than reasonable protection: cf *EzyDVD Pty Ltd v Lahrs Investments Pty Ltd* [2010] 2 QdR 517, 531.

[20] J. Riley, "*Sterilising Talent: a Critical Assessment of Injunctions Enforcing Negative Covenants*", (2012) 34 *Sydney L Rev* 617.

the two agreements not to disclose or misuse confidential information justify declining to enforce the restraint by injunction[21].

[71] Injunctive relief is resisted, however, on the basis that no harm will come to LCR or Crane if Mr Bell takes up the employment proposed with Freo.

[72] Freo and LCR are competitors. Even so, Mr Bell deposes that there is little or no risk of his exploitation of LCR's confidential information in his work with Freo. That, he says, is because "tendering" is not part of that role; he has not worked in Central Queensland for about five years; is "not all that familiar" with LCR's current customer base in that region; and has no intention of breaching his confidentiality obligations under his written agreements with LCR and Crane.

[73] Mr Bell has accepted employment with Freo to manage its Moranbah depot "that services the already established contacts that Freo has with three mines in the surrounding areas". According to Mr Bell, his duties "do not include the procurement of, solicitation of or tendering for business for Freo".

[74] Freo's position description for the employment Mr Bell proposes requires him to carry out four key functions. One is "profitability: to ensure that the Branch is operating within budget to allow Freo Group…to be competitive in the market while maintaining general satisfaction of all stakeholders".

[75] One "key responsibility area" is "customer relations". The Freo position description under that heading speaks of these "key elements/activities":

- "pricing strategy, quoting, after sales and client visitations…"
- "being customer focused and supportive of customer requirements in order to maintain customer loyalty and ensure a sustainable base for the business".

[76] An "outcome measurement" in respect of such a key activity is:

> "Accurate pricing, job taking, scheduling, account validity, order numbers, minimum hires…"

[77] Another key responsibility is "improvement identification". This would require Mr Bell, among other things:

- "To manage the cost of all controllable resources…"
- "Keep management informed of industry trends…"
- "Competitor analysis of operations in the region and reporting of critical issues to senior management."

---

[21] cf *Pearson v HRX Holdings Pty Ltd and Another* (2012) 205 FCR 187, 200-201.

[78] In view of the competitive activities of LCR and Freo, the performance by Mr Bell of his responsibilities with Freo would entail a significant risk of appreciable detriment to LCR's commercial interests through misuse of LCR's confidential information[22].

[79] Dixon J said in *J C Williamson Ltd v Lukey and Mulholland*[23]:

> "If…a clear legal duty is imposed by contract to refrain from some act, then, prima facie, an injunction should go to restrain the doing of that act."

[80] That principle has been applied in enforcing covenants in restraint of trade[24].

[81] And, by cl 12.4(c) of the Shareholders Agreement, Mr Bell acknowledged that Crane might seek "injunctive relief" to prevent a potential breach of his obligations under cl 12, which is a material consideration[25].

[82] There is no good reason to decline to enforce the restraint by injunction.

Disposition

[83] An injunction should be granted to enforce the cl 12 restraint.

[84] I will entertain submissions about the form of order and costs.

---

22 See *Auto Parts* at [73]; *Stacks Taree v Marshall [No 2]* [2010] NSWSC 77, [61]-[65].
23 (1931) 45 CLR 282, 299; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, fn 58.
24 *Perth Airport Pty Ltd v Ridgepoint Corporation Pty Ltd* [2013] WASC 33, [188]-[193].
25 *Perth Airport* at [192].