

LW2903 Business and Law

Lecture 9

Restraint of Trade

Restraint of Trade

- Generally in Hong Kong, covenants in employment contracts which purport to restrict an employee's right of freedom of choice of employment are unenforceable as they are contrary to Articles 33 and 41 of the Basic Law. However, a restrictive covenant may be enforceable if the employer is able to show that the covenant:-

(a) **protects a legitimate business interest** (the three principal types of business interests commonly recognised are: trade secrets and ① confidential information, client or customer connections and stability of workforce); ② ③

(b) extends **no further than is reasonably necessary** to protect such interests; and

(c) is **not contrary to the public policy** in Hong Kong. (Court to determine)

Person in
HK SAR
(non-resident)
shall
enjoy the
same right

freedom of
choice of
occupation

☆

just to
cite
it

contain terms which
will harm the society

Employee

Forster and Sons v Suggett (1918)

unique, no body knows method

- The employee was the manager of a company engaged in glass manufacturing. He had been instructed on certain confidential methods of glass manufacturing invented by the employer. The contract prohibited the employee from being involved in such a trade for five years, upon termination of his employment, anywhere in UK.
- The restriction was held to be reasonable.

glass manufacturing

(a) ✓

(b) ✓

Fitch v Dewes (1921)

律師

14yo-27yo

- A solicitor's clerk was prohibited from working as a solicitor for the rest of his life, within 7 miles of his solicitor employer's office. The employee had dealt confidentially with many clients of his employer. If the employee was allowed to practice as a solicitor in that area, the employer's clients might follow him.
- This restriction was held to be reasonable.

Court think fair competition

X trade secret, X direct contact with customers

Faccenda Chicken Ltd v Fowler [1986]

- Faccenda sold frozen chickens door-to-door. Fowler was their **manager** but had **no direct contact with customers**. He left Faccenda and started a similar business in that area, **using his ex-employer's customer lists**. He also employed 8 people who left Faccenda. The employer brought an action to prevent Fowler from running this rival business. The Court held the restraint was **unreasonable**. Fowler did not use any trade secrets of his ex-employer. He did not have any close relations with his ex-employer's customers.

∴ direct contact & mention X use these data

∴ X direct contact, just cold call

Home Counties Dairies v Skilton [1970]

eg. sb walks into supermarket & 剛好 is the past customer he serve.

- Skilton was employed in Home Counties Dairies to home-deliver milk and dairy products such as cheese and butter. His contract provided that Skilton should not for one year after leaving employment sell milk or dairy products to customers he served during his time with the dairy. The purpose of this restriction was to prevent Skilton from poaching the Dairy's customers. This was held to be a reasonable restriction. However, if the contract term was interpreted as meaning that Skilton could not even work as a salesman in a shop to the company's customers. This would be an unreasonable restriction.

↪ X direct contact with customers (just "employed")

just X directly stealing customers

stealing

Littlewood Organization v Harris

[1978]

The plaintiff was employed in Littlewood and prepared the contents of their mail order catalogue for the next year. He then left Littlewood and joined their main competitor, Universal Stores. The plaintiff's contract provided that upon leaving Littlewood he should not work for Universal for one year. This restriction is quite wide, because it would prevent Harris from working with Universal in any capacity. However, the court interpreted this contract term restrictively in the sense that Harris could not work in Universal using the crucial trading information that he acquired while working for Littlewood.

did not clearly define

can't help to define

- The restriction so interpreted was a reasonable one.

The position in Hong Kong

WPP Marketing Communication (H.K) Ltd v. Christopher O'Donnell

- Position: CEO Asia Pacific ("D")
- Industry: Outdoor advertising industry
- Seniority/Term: 8 years and 8 months
- Type of restraint: Non-competition
- Restraint period: 1 year
- Geographical scope: China, Singapore, Malaysia, India and the Philippines
- Decision: The non-compete covenant was held to be unenforceable for the following reasons:

beyond necessary

unreasonable

possibility

The 12-month duration had to be justified by P with evidence. One test was the time necessary for P to find a suitable replacement for D. But the evidence showed that it had taken P just over 4 months to recruit a replacement for D.

may take project with him & go elsewhere

It was suggested that the duration of 12 months might be justified on "confidential information" grounds. However, there was little evidence to show this. There was evidence that prior to D's departure, he had already been kept away from P's business for a period of time and that consequently, the assertion of 12 months appeared to be questionable.

Union Gain Ltd. v. Chu Wilton Lucas

- Position: Hair stylist ("D")
- Seniority/Term: 3 years and 6 months
- Type of restraint: Non-competition
- Restraint period: 1 year
- Geographical scope: Within a radius of 1/2 mile from the salon operated by the former employer ("P")
- Decision: The non-compete covenant was held to be unenforceable for the following reasons:

P confirmed that the legitimate business interests which P sought to protect only related to existing customers but the non-compete covenant extended beyond dealing with P's existing customers. It purported to prohibit D from serving new customers within the 1/2 mile radius, even though P had no connection with such customers whatsoever.

x contract customer, is customer free choice

P failed to adduce any evidence to justify the validity and enforceability of such a wide-ranging clause.

Pure International (HK) Ltd v. Lo Yan Chak Kenneth

- Position: Personal fitness trainer ("D")
- Seniority/Term: 8 years and 8 months
- Type of restraint: Non-competition
- Restraint period: 6 months
- Geographical scope: Within a radius of 1,000 metres of the principal location of the former employer's business ("P")
- Decision: The non-compete covenant was held to be enforceable for the following reasons:

Two days before he left, D had an interview on the internet with the prospective employer, whose fitness business would be in direct competition with P. The Court held that it was a clear act of dishonesty even though D might have had only a few days of his employment to run. He was in breach of the implied term of trust and confidence. *x job interview, but just interview with other companies (=not loyal) of employer* *breach contract*

The promotional material (i.e. the video interview and the Facebook video) was clearly aimed at attracting customers from other fitness outlets. It constituted a clearly disloyal act, the Court held that D had been in breach of his non-solicitation of customers clause. *relationship btw employer & employee*

A six month period and 1,000 metre radius were justified to allow P to make necessary adjustments to compensate for the loss of a key fitness trainer, who other trainers might inevitably want to follow, and to whom existing customers might want to transfer training sessions in due course. Without such restraint, considerable harm (even if only in the short-term) was likely to result.

if clause not clear → I delete (But X rewrite contract)

- If a restrictive covenant fails to pass the test of reasonableness then it will be struck down as void, unless the unreasonable aspect can be **severed** without changing the character of the clause (often referred to as "blue-pencilling"). However, in applying a blue pencil to excise those parts which are unreasonable, the Courts will not rewrite the restrictive covenant if, for example, the time-frame or geographical scope is unreasonably wide.

(Goldson v Goldman) (1915) — cannot set up a shop/business in UK, or several

European countries