

BURROWES and Company



Barristers and Solicitors

Client Newsletter

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A RESTRAINT OF TRADE IS NO JOKE

In *Green v Transpacific Industries Group (NZ) Limited* the Employment Court reinforces the importance of a Restraint of Trade, taking note that employees should take the restraint seriously and employers can rely on the restraint to protect their business interests.

The Facts

Mr Green was an employee at Transpacific, a major company in the solid waste sector. A restraint of trade clause was included in Mr Green's employment contract. The restraint prevented Mr Green from working for a trade competitor for up to three months after the end of his employment. In early November 2010, Mr Green told Transpacific that he was going to take up a position with a trade competitor. Transpacific placed Mr Green on gardening leave for his notice period for resignation and reminded him of his restraint of trade obligation.

Mr Green began working at the competing company in late November 2010, ignoring his restraint of trade clause in his employment contract with Transpacific. Transpacific got an interim injunction from the Employment Relations Authority ('ERA'), preventing Mr Green from working for a competitor of Transpacific.

Mr Green claimed that his restraint of trade obligations under the employment contract with Transpacific had been cancelled by Transpacific, when they put him on gardening leave for his notice period without being contractually entitled to do so.

At Employment Court

As the decision of the ERA was an interim one, the Court looked at the facts of the case on the basis of arguable proof. The Court found that the restraint of trade clause had not been cancelled by Transpacific putting Mr Green on gardening leave for his notice period.

In regards to the restraint of trade provisions the Court noted that the non-competition part of the restraint was unenforceable. The Court stated that the skills and knowledge of Mr Green were not the property of Transpacific, and the non-competition part of the restraint was therefore void.

The other part of the restraint of trade clause covered protection of proprietary interests of Transpacific. These interests included confidential information regarding the business of customers of Transpacific with whom Mr Green dealt with. The Court found that Transpacific had an arguable case for protection of their proprietary interests by way of reasonable restraint.

Summary

The Court decision reinforces the position that employees are to take the restraint of trade provisions in their employment contracts more seriously, and will be reprimanded for any breaches. Employers can also rely on the restraint to protect their business interests, knowing that the restraint will be enforced. Businesses need to take more care when drafting the restraint of trade clause, as in this case the court did not uphold the non-competition part of the restraint as it was too general. The restraint of trade clause should be specific to the business in order for the restraint to be enforceable.



CONSUMER LAW UPDATE

A Consumer Law Reform Bill (the 'Bill') will be introduced to Parliament later this year to update and simplify consumer law. This is in recognition of the fact that the laws covering layby sales, door to door sales, unsolicited goods and services, and the regulations for auctioneers have not been reviewed for some time.



The Ministry of Consumer Affairs (the 'Ministry') released a detailed discussion paper on Consumer Law Reform in June 2010. Extensive consultation has taken place since that time and, together with submissions received, has resulted in five additional papers being produced by the Ministry.

The Bill will reform the Consumer Guarantees Act, the Weights and Measures Act, the Layby Sales Act, the Fair Trading Act, the Door to Door Sales Act, the Auctioneers Act and the Unsolicited Goods and Services Act. Each Act has been reviewed taking into consideration:

- its history, original purpose and ongoing relevance, and
- any gaps in the law, and the effectiveness and overall enforceability of the Act.

It is beyond the scope of this article to describe all of the reforms proposed. However, listed below are some that may be of interest:

- The Fair Trading Act will be amended to update and simplify consumer law related to layby sales,

unsolicited goods and services, door to door sales, and the regulation of auctioneers. It is proposed that infringement notices for minor breaches of the Fair Trading Act will be issued by the Commerce Commission.

- The Consumer Guarantees Act will be amended to require greater disclosure to consumers on express warranties and provide consumers who take up cover under express warranties a statutory cooling off period.
- Changes will be introduced to product safety protections. The Minister will be empowered to issue Government Product Safety Statements that will provide some guidance on acceptable product safety. Notification of product safety recalls will be mandatory and recalls will be published on the Ministry website. Goods that are recalled may be required by the Ministry to be destroyed and a supplier may be asked by the Ministry to stop selling a product if it has been implicated in a serious incident.
- The law related to auctions will be updated. The Consumer Guarantees Act "acceptable quality" provisions will apply to goods sold by auction, online, and to those sold by tender. The Auctioneers Act will be repealed and minimum standards will be set for the registration of auctioneers and the conduct of auctions.
- Unsubstantiated claims will be prohibited under the Fair Trading Act. The Ministry anticipates this measure will assist the Commerce Commission in enforcing the Fair Trading Act as well as assisting consumer confidence and good market conduct.
- The jurisdiction of the Disputes Tribunal will be extended to cover complaints about deceptive and misleading conduct and to provide for the full range of remedies available under the Fair Trading Act.

To keep up to date with the Bill and the proposed changes readers may wish to visit the Ministry website www.consumeraffairs.govt.nz.

GIFT DUTY UPDATE

Currently, Gift Duty is imposed on all gifts with a total value exceeding \$27,000 in any 12 month period. The Taxation (Tax Administration and Remedial Matters) Bill 2010 aims to abolish gift duty on 1 October 2011. A Government review has concluded that gift duty no longer raises any significant revenue, the protection it offers is inefficient and limited and there are high compliance costs incurred.

The First Reading of the Bill took place on 7 December 2010 and a Select Committee Report has been released on 20 June 2011. The majority in the Select

Committee maintained that there is no evidence to suggest that the abolition of gift duty would lead to an increase in trusts or the value of assets trusts hold. However, the minority believe that any legislation proposing a gift duty should be delayed until the Law Commission's review of trust law is complete. A date has not been set for the Second Reading of the Bill.

In response to the Christchurch earthquakes, gift duty has recently been waived for trading stock donated to those affected by the earthquakes.

COPYRIGHT (INFRINGING FILE SHARING) AMENDMENT ACT

The internet has totally revolutionised the entertainment industry. Downloading music and movies, also known as file sharing, has become common practice in this day and age. However, it is sometimes easy to forget that behind that one click on the “download” button lies someone’s art, their work and source of income that, when downloaded without permission, is in breach of our copyright laws.

The Copyright (Infringing File Sharing) Amendment Bill (the ‘Bill’) was passed into law by Parliament on 14 April this year. The Bill repeals a section of the Copyright Act 1994 and replaces it with two new sections that specifically deal with illegal peer-to-peer file sharing.

A review of section 92A of the Copyright Act 1994 concluded that the enforcement measure was ineffective in its current state and its repealed and subsequent replacement is intended to offer greater deterrence for illegal file sharing through the implementation of a three-step notice regime. Previous concerns over an ad-hoc approach to the suspension of internet accounts and a lack of judicial oversight have been addressed with the new Bill requiring either the Copyright Tribunal (the ‘Tribunal’) and/or District Court to assess matters and oversee the formulation of proportionate remedies.



The Three-Step Regime

The Bill provides an overview of the ‘Infringing File Sharing’ regime and states that the purpose of the amendment is to “provide copyright owners with a special regime for taking enforcement action against people who infringe copyright through file sharing.”

The regime itself is based on a notice system where three kinds of infringement notices will be sent to offending account holders before enforcement ensues. The first notice is a detection notice, it is followed by a

warning notice, and finally an enforcement notice. The notices are to be issued to the account holder by the Internet Protocol Address Provider (IPAP); which was formerly known as an Internet Service Provider (ISP).

Penalties

If an account holder continues to infringe after receiving all three notices, the copyright owner is able, under the new Act, to apply to the Tribunal or District Court for relief and enforcement options.

The Act also permits the Tribunal to award damages against the account holder, the sum of which is to be determined by the Tribunal. The amount ordered can be up to \$15,000, and is to be based on the level of damage or loss sustained by the copyright holder.

Alternatively, the copyright holder will be able to apply to the District Court for a suspension of the account holder’s internet account. The District Court may, after considering both parties arguments, make a suspension order requiring an IPAP to suspend the internet account of an offender for up to six months. The suspension order is supposed to be reserved for more serious offenders.

Account holders are able to challenge the infringement notices and can request a hearing if they feel they should not be penalised.

ISP Definition Amended

The new amendment has also redefined an internet service provider and the former acronym of an ‘ISP’ has been replaced with ‘IPAP’, which stands for Internet Protocol Address Provider. The new definition is a broader one which encapsulates some organisations that are not traditional ISPs such as businesses and universities. The amendment bestows upon such organisations similar responsibilities as a traditional ISP and requires such organisations to send notices to infringers in the same manner as a traditional ISP.

FAIR TRADING (SOLICITING ON BEHALF OF

The Commerce Committee reported back on the Fair Trading (Soliciting on Behalf of Charities) Amendment Bill at the end of March 2011.

The Bill proposed to increase the clarity for public accountability of third-party businesses collecting funds on behalf of registered charities. The Bill addressed the issue where a disproportionate amount of the donated

money is being used by the fund-raiser to cover ‘costs’, where the donating public is unaware of this. The Bill looks to amend section 27(1) of the Fair Trading Act 1968, by introducing new positive disclosure requirements on the third-party businesses collecting for charities. The regulations will be included in a new section 28A underlining the third-party disclosure requirements.

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STAFF SOLICITOR SECONDED TO INSURANCE COUNCIL

One of the staff solicitors at Burrowes and Company has recently been seconded to the Insurance Council for a 12 month term. Simon Wilson, pictured at the Insurance Council, will be assisting the Insurance Council with a number of legal issues – primarily in respect of Christchurch earthquake issues, prudential regulation of insurance companies and other regulatory issues. Burrowes and Company specialises in insurance law and its principal Michael Burrowes says the firm is delighted to assist the Insurance Council at a busy time for the insurance industry.



FAIR TRADING (SOLICITING ON BEHALF OF CHARITIES) AMENDMENT BILL

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The Committee recommends disclosure regulations for fund-raisers making requests for charitable purposes. The regulations look to impose the following disclosure requirements for information regarding: the fundraiser, the charity, the relationship between the fund-raiser and the charity, the financial benefits to the fundraiser and the amount of donation included in the price of a good or service sold by the fundraiser. The definition of “fund-raiser” is to include a person

who, in business, makes requests for charitable purposes and that person’s employer and principal. This definition does not include charities, their employees or volunteers. The Bill is aimed solely at third-party businesses carrying out requests on behalf of charities. The regulations will prescribe the manner in which the disclosure is required.

The Bill sets out to control the professional third-party businesses that collect on behalf of charities, and is not aimed at the charities themselves.

REVAMP FOR BODY CORPORATE RULES

From June 20, 2011 bodies corporate must comply with the Unit Titles Act 2010. The new Act places greater responsibilities and obligations on chairs, committees and owners than its predecessor.

A body corporate must now hold a general account and a long-term maintenance account. However, it can, by a special resolution with a 75 per cent vote, opt to hold a single fund. The body corporate is unable to use funds from its long-term maintenance fund for general operating expenses.

Every body corporate must regardless of their size have a chairperson, who is responsible for calling meetings. The Act also requires that bodies corporate establish a maintenance plan that covers at least 10 years from when it was last reviewed. Absentee owners must also appoint a person in NZ to act as agent if they are absent for more than three consecutive weeks. This will help resolve situations where owners

move and do not notify their body corporate of their whereabouts.

Recent changes to the law mean that vendors need to disclose a significant amount of information to purchasers before they sell unit titled properties. Vendors are unable to contract out of the requirements. This disclosure regime for selling property requires pre-contract, pre-settlement and additional disclosure statements. There are legal risks to owners if disclosures are not made in a timely manner. The burden of producing these statements on owner-run bodies has vastly increased.

Those who are thinking about selling their apartments from now on will need to make sure they get access to these documents or make sure that their Body Corporate Committee has the processes in place to get documents ready.

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