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Simpson Western
17th floor, AIA Building, 5-7 Byron Avenue, Private Bag 93533, Takapuna, North Shore City • Ph: 09 486 3058 • Fax: 09 486 2235
E-mail: enquiries@simpsonwestern.co.nz

Welcome to the final issue of Commercial e.Speaking *for 2007. We hope you find the articles both useful and of interest to you. If you would like to see specific business or commercial topics covered in future issues, please get in touch with us. The 18th issue of* Commercial e.Speaking *will be published in February 2008.*

Thank you to all the readers who took part in our readership survey in August-September, and also congratulations to the reader who won the draw for a case of wine. All your responses were very helpful and we enjoyed reading the suggestions for topics to be covered in future. We are pleased to be providing a useful, relevant and interesting newsletter to you.

If you require any further information on any of the topics covered in Commercial e.Speaking*, then don't hesitate to contact us. If you do not want to receive this newsletter, please* unsubscribe.

NZLAW
AN ASSOCIATION OF INDEPENDENT LEGAL PRACTICES

Restraint of Trade Clauses
- Protect your business

Imagine the pain of watching a once-loyal employee cross the fence and join the competitor's team. As competition in the market place increases, employers need to be aware of this risk and take the necessary steps to protect confidential information, trade secrets, goodwill and their customer base. A restraint of trade clause is one way for an employer to prevent an ex-employee from taking this information and using it in competition against them.

A restraint of trade clause may be included as an express term in an employment agreement to protect an employer's proprietary interests in its clients, confidential information, and even employees after termination of employment. These clauses serve to prevent ex-employees from working in particular types of work and particular geographical locations for a fixed period of time or from approaching or soliciting clients or employees.

How could it benefit my business?

The primary purpose of a restraint of trade clause is to protect the intellectual property that attaches to your business. The more senior an employee, the more valuable information they are likely to have access to and the greater the risk they pose to your business if they choose to jump ship. Pre-empting the risk and taking steps to protect these assets is not only sensible but also increasingly necessary.

If a restraint is agreed at the commencement of the employment no extra consideration is required. However, to be enforceable a restraint must be reasonable. The clause must protect legitimate interests and cannot extend beyond what is necessary to protect this interest. In general the greater the scope of the clause in terms of geographical location, time, and type of employment, the harder it will be to enforce.

A clause to fit your business

It is a fine balancing act between protecting the business interests of the employer and the right of the employee to find work using skills and knowledge which have been acquired by the employee in the ordinary course of employment.

Any restraint of trade clause should be tailored to the circumstances of employment by taking into account the:

- Nature of the employer's business
- Extent of the information to which the employee is likely to have access, and the
- Necessary scope of any restraint including time, geographical location and type of work.

A generic clause is likely to be more difficult to enforce than a specific and sufficiently narrow clause. For this reason it is important to get advice when including a restraint of trade term in an employment agreement.

Enforcing a restraint of trade: ex-employee and new employer

An injunction is an effective way to prevent a likely breach. Damages are also available if the breach has resulted in loss. A new employer can also face consequences if they can be shown to have knowingly aided and abetted an employee breach their employment agreement. Penalties against the new employer can be claimed in the Employment Relations Authority and Employment Court, with a claim for damages being an option in the High Court. A carefully timed and worded letter sent to an ex-employee and potential new employer can be an effective tool in preventing a breach.

Summary

A restraint of trade clause should be considered as a viable option when looking to protect your business against ex-employees. The Authority and the courts are willing to uphold these clauses provided they are well drafted and can be shown to be reasonable.

If you have concerns about the fate of valuable business information and relationships with customers if an employee leaves talk with us about creating a restraint of trade clause that will give your business the future protection it may need.

New Zealand Emissions Trading Scheme – Forestry

The government has agreed in principle to introduce an Emissions Trading Scheme (ETS) covering greenhouse gases in New Zealand. It will require specific people and companies to surrender emission units (NZUs) or other Kyoto Protocol (KP) emission units to match the level of emissions for which they are responsible. NZUs will be able to be traded by the private sector.

Still largely in the planning stage, details for the forestry ETS have already been announced. The ETS will be designed for sales to, and purchases from, international trading markets. It is expected that MAF will be responsible for the day-to-day administration of the forestry components of the ETS, but overall responsibility for administration will be under the control of one central agency, yet to be agreed.

As a forest grows it removes CO^2 from the atmosphere and stores it as wood. Post-1989 forests can generate Removal Units (sink units) under the KP. A removal unit equals one tonne of carbon. Under the ETS, participants will be awarded NZUs equivalent to one tonne of carbon for growth that occurs from 1 January 2008. A radiata pine forest absorbs an average of 30 tonnes of CO^2/hectare/year. On harvest, about two-thirds of this will be lost and will have to be repaid.

Forestry to enter the ETS on 1 January 2008

In order to pre-empt foresters milling early to 'beat' the controls and thereby increasing emissions, the government agreed to begin the forestry ETS on 1 January 2008.

Landowners with less than 50 hectares of pre-1990 forest on 1 September 2007 can apply for ETS exemption. Owners deforesting less than 2 hectares of their pre-1990 forest land holding during the first five years of ETS will not have to report this to the administering agency. Removal of wilding pines will be exempt and other exemptions are being contemplated. Exemption applications must be made within 18 months of the legislation being passed, which is not expected until after January 2008.

Kyoto Protocol forest age distinctions

The KP makes a distinction between pre-1990 and post-1989 forests.

Pre-1990 forests

Under the KP, pre-1990 forests do not earn emission units, however the government intends to gift emission units to owners of pre-1990 forest land. Un-exempted pre-1990 forests will be subject to emission liabilities if they are deforested, unless replanted or allowed to regenerate. The per-hectare units that will be given to pre-1990 forest owners have not been finalised, but preliminary estimates are 39 units/hectare worth around $585/hectare, assuming a carbon price of $15/tonne. It is anticipated that NZUs will be allocated in 2008-2009 for forests close to harvesting.

Post-1989 forests

Post-1989 forest land includes land that was not in forest as at 31 December 1989 and forest land that was deforested between 1 January 1990 and 1 January 2008.

Post-1989 forest owners can choose to participate in the ETS and take responsibility for carbon stock changes that occur from 2008 onwards. They will receive NZUs if those stocks increase as a result of growth and will be required to surrender NZUs if those stocks decrease as the result of deforestation or fire. If the post-1989 forest owner decides not to enter the ETS then credits and liabilities default to the Crown. Participants will be entitled to receive one NZU for each tonne of carbon dioxide stored in their forests.

The Afforestation Grant Scheme (AGS)

Unveiled in late 2006, the AGS allows foresters to receive a government grant for planting of new forests on previously unforested land. Participants will own the new forest but the Crown will own the NZUs and will meet all harvesting and deforestation liabilities.

How are NZUs calculated?

Forest areas will be determined according to either geographic information system data or survey plans. Carbon stock assessments will be carried out by registered carbon certifiers, most of whom will be registered forestry consultants.

This information has been extracted from MAF's website: www.maf.govt.nz/climatechange

Business Briefs

Updates from the Ministry of Economic Development

PPSR Website Upgrade

A new-look website for the Personal Property Securities Register (PPSR) will be launched shortly.

Voluntary Administration (VA)

An amendment to the Companies Act that came into force on 1 November 2007 introduced a new insolvency regime and process of ‘voluntary administration’. This is an alternative to liquidation for companies in financial distress and is considered a short term measure. The VA regime will freeze the company’s financial position while the administrator and the creditors determine the company’s future. From 6 November 2007 there has been a service for administrators to notify the Registrar of Companies (www.companies.govt.nz) of their appointment and manage their administration online.

Phoenix Companies

The same 1 November 2007 amendment to the Companies Act introduced a number of provisions to deal with phoenix companies (new companies promoted by delinquent traders who have buried old problems and creditors in the ashes of a failed company). The new amendments prohibit a person who is a director of a company placed in liquidation (because it was unable to pay its due debts) within the preceding five years from incorporating a new company under a former name or a similar name to that of the failed company. The person must have been a director of the failed company within 12 months prior to the commencement of the liquidation. The potential penalties for breach are up to five years imprisonment or a fine not exceeding $200,000.

‘Settle on title’: when exactly is that?

When buying land off a preliminary plan in a subdivision resource consent purchasers regularly include a ‘sunset clause’ in the agreement. The recent High Court case of *Sicilian Estates Limited v Deavoll* (CIV 2007-425-147) reviewed a clause (of a common type) which made section sales ‘conditional upon deposit of the Vendor’s plan of subdivision and issue of separate Certificate of Title to the property’ by 31 May 2006. Sicilian Estates filed all subdivision documents with the Land Registry on 17 May 2006. Two purchasers relied on the sunset clause and cancelled their contracts on 1 June 2006. In the afternoon of 9 June 2006 the subdivision dealing was completed and the subdivision plan was deemed deposited on 17 May 2006 and new titles were issued with the 17 May date.

The judge reviewed the Land Registry process and decided Sicilian Estates had met all its contractual obligations. The purchasers were not entitled to cancel on 1 June even though new titles were not searchable until 9 June despite the fact that the Land Registry might have rejected the new title dealing after 1 June if the documentation had turned out to be defective.

This result will surprise many in the property field. Clauses giving a cancellation right to purchasers are likely to be tightened to ‘If by [sunset date] the vendor has not given the Purchaser notice that a search of the new title is available then the purchaser may cancel . . .“ or similar.

Insolvency Act 2006 commencement

With the issue of the Insolvency (Personal Insolvency) Regulations 2007 on 1 November 2007 the Insolvency Act 2006 will come into force (and replace the Insolvency Act 1967) on 3 December 2007. Main changes are:

- No Asset Procedure (NAP): a new alternative to bankruptcy. Consumer-type debtors can seek entry to the NAP if they have no assets of realisable value, no means of repaying their creditors, debts of between $1,000 and $40,000, have not been previously bankrupt or in a NAP, and have no trust involvement.
- Transfer of Summary Instalment Order (SIO) regime: this has been transferred from the District Court to the Official Assignee. SIOs provide debtors who have the means to pay their creditors over time an opportunity to avoid bankruptcy. The debt threshold for SIOs will be increased to $40,000 with the period for repayment capable of being extended to five years where special circumstances exist.
- Debtor Petitions: debtors wanting to adjudicate themselves bankrupt will now make application to the Official Assignee rather than the District Court.

- Filing Statement of Affairs: entering into bankruptcy, NAP or SIO will require the debtor to complete a Statement of Affairs together with an Application for Entry. Debtors can complete and file their Statement of Affairs and Application electronically or manually.
- Release from bankruptcy: where bankruptcy has been creditor initiated, discharge from bankruptcy will occur three years after receipt by the Official Assignee of a satisfactory Statement of Affairs.

Company power restricted by family law rights

Since the Property (Relationships) Act came into force on 1 February 2002 there have been a number of cases using expanded 'trust busting' provisions looking through trust arrangements which are an *alter ego* of one spouse or partner.

In the recent High Court case of *Singh v K & M K Singh Farms Limited* (CIV 2007-419-911) there was a similar restriction on exercising company powers.

Mrs Singh was born and raised in India and came to New Zealand in late 1998 to marry. The marriage was arranged by parents. From marriage, Mr and Mrs Singh lived in a house on a Taupiri dairy farm owned by K & M K Singh Farms Limited (the Company) where Mrs Singh held a 10% shareholding. The remaining 90% was held by Mr Singh, his parents, brother and sister.

After separating in late 2006 Mrs Singh and two young children remained living in the farm dwelling. The Company served on Mrs Singh a Notice to Quit under the Residential Tenancies Act 1986 and then applied to the Tenancy Tribunal for a Possession Order. Mrs Singh sought an interim injunction to restrain the company from evicting her and her children from the farmhouse. Mrs Singh complained that a directors' resolution requiring her to leave the property was unenforceable on the grounds that the directors acted for an improper purpose. She also attacked a ratifying shareholders' resolution of which she was not notified and which was signed by all shareholders other than her. The judge had to address an overlap between relationship property issues and the commercial imperatives of the company. He was satisfied that, at the time the directors' resolution was passed, there was no true commercial motivation for eviction. He considered the company was being used as nothing more than an *alter ego* for the interests of the Singh family and awarded an interim injunction to give Mrs Singh time to apply for an Occupation Order in the Family Court.

As with trust law, the courts will willingly restrict company powers if they perceive corporate devices being used to compromise relationship property rights.

Deposit payments: if in doubt use a bank cheque

In an age of electronic funds transfer bank cheques are becoming rarer. In its recent decision in *Southbourne Investments Limited v Greenmount Manufacturing Limited* (SC 96/2006) the Supreme Court reconsidered the adequacy of a personal cheque in payment of a purchase deposit. A personal cheque is not a bank cheque or cleared funds. The same issue was considered in the 2005 Supreme Court case *Otago Station Estates Limited v Parker.*

Southbourne had leased warehouse premises to Greenmount who had an option to purchase the property for a fixed $3,500,000 price in the first 18 months of the lease. This 18 month period expired Monday, 31 October 2005. On 27 October 2005 Greenmount delivered a signed unconditional sale and purchase agreement and Greenmount's personal cheque for $350,000 in payment of the deposit by courier to the landlord's lawyers. It was not until 4 November (eight days later) that Southbourne objected specifically to the mode of payment.

The Supreme Court confirmed its Otago Station Estates passage, 'A vendor who takes a personal cheque or knowingly allows his or her agent to do so, without objecting specifically to the form of tender of payment as soon as he or she is aware of it, must expect to be taken to have dispensed with the need for payment through legal tender or its equivalent. The vendor would then be estopped from asserting that the mode of payment did not comply with the contractual requirement.' The central question in Southbourne was whether Southbourne had failed to object in a timely way to Greenmount's use of its personal cheque. It found that there was not enough evidence before the court to determine the matter either way and a new trial was ordered to determine whether Southbourne had failed to object in a timely way to use of a personal cheque.

Two Supreme Court decisions in two years suggest this is a problem area. Reluctant vendors have reason to scrutinise the mode of deposit payment while our courts underwrite the supremacy of legal tender.

If in doubt, use a bank cheque when paying a deposit for a property purchase.