MAGISTRATES COURT OF SOUTH AUSTRALIA

(General Civil)

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LOCHDYL PTY LTD v LIND

[2024] SAMC 43

Judgment of Magistrate Vozzo

15 April 2024

TRADE AND COMMERCE - OTHER REGULATION OF TRADE OR COMMERCE - RESTRAINTS OF TRADE - VALIDITY AND REASONABLENESS - PARTICULAR CASES - EMPLOYMENT

Applicant: LOCHDYL PTY LTD Counsel: MR A. BRALEY

Respondent: ASHLEY LIND Counsel: MR A. WRIGHT

Hearing Date/s: 07/02/2024, 08/02/2024, 01/03/2024

File No/s: CIV-23-009355

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LOCHDYL PTY LTD v LIND
[2024] SAMC 43

Magistrate Vozzo

General Civil

1 The applicant carries on a hairdressing business trading as ‘Changing Looks Hair Salon’. The respondent is a hairdresser and former employee of the applicant. The applicant is seeking $85,000 as damages from the respondent for alleged breaches of a restraint of trade clause in her employment contract dated 24 December 2022 (‘Employment Contract’).

2 Pursuant to clause 28 of the Employment Contract, the respondent was restrained from diverting or attempting to divert from the applicant any business it had enjoyed, solicited or attempted to solicit from its customers prior to the termination of the respondent’s employment for a two-year period after termination (‘Restraint Clause’).

3 The applicant alleges that the respondent breached the Restraint Clause by posting two social media messages on her Facebook pages after she ceased employment with the applicant on 29 April 2023.

4 The first message was posted on the respondent’s personal ‘Ash Lee’ Facebook page on 30 April 2023 (‘Initial Post’). The Initial Post announced that the respondent had left the employ of the applicant and started her own hairdressing business. She specifically named the Changing Looks business and tagged a link to her new business Facebook page called ‘Hair by Ash’. The applicant says that while the respondent’s personal Facebook page was private and not accessible to the public, some of the applicant’s customers had access to the Initial Post as ‘friends’ of the respondent.

5 The second message was posted on the respondent’s Hair by Ash business Facebook page on 5 May 2023 (‘Second Post’).[1] Among other things, the respondent refers to having a ‘wonderful first week’ and thanked ‘all [her] wonderful clients who have stayed with [her]’.

6 The applicant says that the Posts represent a clear attempt by the respondent to entreat and persuade business the applicant had solicited from its customers prior to the termination of the respondent’s employment with the applicant in breach of the Restraint Clause.

7 The applicant alleges that a significant number of higher paying repeat customers cancelled their ongoing appointments with the applicant to seek

[1] Together with the First Post are referred to as ‘the Posts’.

hairdressing services from the respondent, causing the applicant to suffer loss of future earnings from those customers.

8 The respondent's primary position is that the Restraint Clause is unenforceable because the two-year restraint period is unreasonable. The respondent says that in the absence of 'cascading' restraint periods in the Restraint Clause, the covenant cannot be read down to a lesser reasonable period. Alternatively, if the duration of the restraint is reasonable, the respondent says that the applicant (i) is bound by its pleading, which relies only on the Posts as the alleged contravening conduct; and (ii) has not established that the Posts amounted to a breach of the Restraint Clause, as properly construed, nor that it has suffered any loss caused by the Posts.

Overview of Outcome

9 To borrow the words of his Honour Justice Feutrill in *Techforce Personnel Pty Ltd v Jaffer*,[2] the Restraint Clause 'is not a model of contractual drafting or clarity'. It is in the following terms:

> 28. During the term of the Employee's active employment with the Employer, and for two (2) years thereafter, the Employee will not divert or attempt to divert from the Employer any business the Employer had enjoyed, solicited, attempted to solicit, from its customers, prior to termination or expiration, as the case may be, of the Employee's employment with the Employer.

10 The central concept of diversion is not defined. Nor is the expression 'attempted to solicit'. The applicant's 'customers' are also not defined or identifiable by reference to a list, period, service or frequency of patronage.

11 For the reasons which follow, I have determined that the applicant failed to establish that the extent of the restraint and the two-year duration are reasonable and no more than what was reasonably necessary to protect the legitimate business interest of the applicant in the circumstances of this case. The Restraint Clause is void and unenforceable.

12 It is therefore unnecessary for the Court to determine whether the Posts breached the Restraint Clause, and if so, whether those breaches caused the applicant to suffer any loss.

Trial issues

13 At trial, the applicant did not press the alternative cause of action based on alleged breaches of fiduciary duties owed between employer and employee (pleaded at Statement of Claim, [8]-[11]), nor the allegations about the removal of physical client cards from the Changing Looks business (pleaded at Statement of Claim, [7.1.11]).

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[2] [2023] FCA 1674 ('*Techforce*'), [16].

14 The applicant also conceded that if the two-year restraint period was unreasonable, the Court could not read down the period to a shorter reasonable period, and the Restraint Clause would be unenforceable.

15 The central issue to be determined in this proceeding is whether the Restraint Clause is legally enforceable. The following key questions arise:

1. Did the applicant have a legitimate interest in restraining the respondent?

2. If there was a legitimate interest, did the Restraint Clause in its extent or duration do more than was reasonably necessary to protect that interest?[3]

Witnesses

16 There were three witnesses at trial: Cheryl Bullen, the sole director of the applicant company, the respondent and her sister Stacey Lind, one of the former owners of the Changing Looks Hair Salon business who sold the business to the applicant. All three are experienced hairdressers. They generally appeared to give their evidence in an honest and fair manner.

17 The background facts about the nature and make up of the customer base of the Changing Looks business at the time of the sale, the close and personal relationship between a hairdresser and customer and the length of time it took to make a connection with a 'new' customer were generally uncontentious.

18 The evidence about the circumstances in which the respondent left and was replaced was also largely consistent, as was the evidence about how the business was operated after the respondent left. The dispute concerned the impact of those circumstances on the applicant's claimed loss of earnings attributed solely to the Posts.

19 The contentious factual issues mostly related to the number of former customers of the applicant who had followed the respondent after she left the applicant's employment and whether they followed as a result of the Posts. I did not regard the evidence of either Ms Bullen or the respondent to be entirely reliable on the issue of how many former customers (for the purposes of the Restraint Clause) had left and given their business to the respondent after she ceased employment with the applicant.

20 Nevertheless, given my finding that the Restraint Clause is void and unenforceable, it is not necessary for me to make any findings in respect of the applicant's claimed loss. Nor is it necessary to make any evidentiary rulings in

[3] *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657 ('*Wallis Nominees*'), [17] - [18], [50].

respect of the evidence adduced or not adduced by a party in connection with the applicant's former customers and/or the quantification of the alleged loss.

1. Did the applicant have a legitimate interest in restraining the respondent?

Principles governing restraint of trade clauses

21 The basic principles governing the enforceability of a restraint of trade clause in a contract are well settled and are helpfully summarised in *Wallis Nominees* at [14]:[4]

- a contractual provision in restraint of trade is prima facie void;
- the presumption can, however, be rebutted and the restraint justified by the special circumstances of a particular case, if the restriction is reasonable by reference to the interests of the parties;
- the validity of the covenant in a contract is to be judged as at the date of the contract;
- a stricter view is taken of covenants in restraint of trade in employment contracts than those contained in contracts for the sale of a business;
- the onus of proving the special circumstances justifying the restraint is on the person seeking to enforce the covenant;
- so far as the parties' interests are concerned, the restraint must impose no more than adequate protection to a party in whose favour it is imposed. If the court is satisfied that the restraint confers greater protection than can be justified, there is no further issue of reasonableness;
- the meaning of the restraint clause may be construed by reference to the factual matrix, documentary context and surrounding circumstances.

22 In *International Cleaning Services (Australia) Pty Ltd v Dmytrenko,*[5] his Honour Justice Stanley provides a detailed analysis and summary of the principles applicable to the enforceability of restrictive covenants in employment contracts at [16] – [41].

Background

23 On 19 December 2022, the applicant purchased the Changing Looks business from the respondent's sister and mother, Stacey and Vicki Lind ('the Vendors') for a purchase price of $82,000 pursuant to a written business sale agreement ('Sale

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[4] (2013) 45 VR 657; citing the judge at first instance.

[5] [2020] SASC 222 ('*International Cleaning*').

Agreement').[6] The purchase price was comprised of $75,000 for the business assets which included goodwill and the balance for the estimated value of stock.

24 The Sale Agreement included comprehensive non-compete restraint covenants in clause 14 and a term that Stacey Lind would be employed by the applicant for 12 months after the sale.[7]

25 At the time of the sale, the respondent was employed by the Vendors as a hairdresser on a casual basis working around 23.5 hours a week. As such, the respondent received no entitlements to paid leave. The respondent was paid an hourly rate of $31.53 for hours worked Monday to Friday and $37.83 for Saturdays. This hourly rated apparently equated to some $1.80 above the applicable hairdressers' award rate.

26 Pursuant to the Sale Agreement, the applicant agreed to make a written offer to each of the five 'Specified Employees' including the respondent for employment in a position substantially similar to and on terms and conditions no less favourable than they had with the Vendors. The applicant and the Vendors agreed to use all reasonable endeavours to ensure that the Specified Employees accepted the employment offer.[8]

27 There was no evidence of the existence of a written employment agreement between the respondent and the Vendors. Nor was there any evidence of the existence of any restraint of trade term in the respondent's previous employment agreement. Annexure B to the Sale Agreement included only the basic details of the employment terms between the Specified Employees and the Vendors i.e., start date; full or part time or casual position; minimum hours worked per week and hourly pay rates.

28 The respondent and other Specified Employees received a written offer of employment comprising of a 12-page pro-forma employment contract with standard terms and conditions. The offer document, which Ms Bullen said had been prepared by lawyers, required the individual details of the employee to be inserted by hand (i.e., name and address, commencement date, position and hourly wage rate) and for the document to be signed and dated by the parties in order to form the employment contract.

29 Ms Bullen said that she provided two copies of the offer document to the Specified Employees about a week before the applicant started trading on 20 December 2022. This was disputed by respondent. She said she only received one copy of the offer document on her first working day on 20 December 2022.

30 The respondent did not sign the offer document immediately. She said that she wanted her partner's mother (a teacher) to read it and explain some of the

[6] Ex. A18.
[7] Clause 4 of Annexure C.
[8] Clause 7.3.

terms. According to Ms Bullen, the other Specified Employees had already returned the signed copies. The respondent dated, signed and returned the completed offer document to Ms Bullen around the close of business on 24 December 2022 before she had the opportunity to have her partner's mother look at the offer document.

31 On 11 April 2023, the respondent notified Ms Bullen of her intention to cease her employment in order to go work for a friend at a salon closer to the respondent's home. The respondent informed Ms Bullen that her last day would be 29 April 2023. It was not in dispute in this matter that the respondent's casual employment could have been terminated by either party with a day's notice.

32 The applicant did not recruit another hairdresser to replace the respondent during the notice period. After consulting Stacey Lind, the applicant proposed, and the respondent agreed, to inform customers that the respondent was leaving to take her career in a different direction focusing on health wellness including reiki therapy. It is apparently not uncommon for hairdressing salon owners to tell customers the employee is doing something other than hairdressing to avoid losing customers who follow the employee when they leave.

33 On 30 April 2023, the respondent commenced trading as Hair by Ash (as a sole trader) by renting a chair at another hair salon owned by a friend. The friend's salon was outside the Elizabeth Area in which the applicant conducted the Changing Looks business. However, the respondent essentially provides the same or substantially similar hairdressing services as Hair by Ash as she did at Changing Looks.

34 On and from 30 April 2023, the respondent promoted her new business through social media including posting on the Tea Tree Gully Community Forum Facebook page.

Applicant's position on legitimate interest

35 In essence, the applicant argues that it has a legitimate interest in protecting the goodwill of the Changing Looks business in circumstances where:

- the applicant paid valuable consideration for goodwill;
- the goodwill was largely comprised of the existing Changing Looks customer base;
- the respondent as a former employee of the Vendors had forged and maintained close and personal connections with the existing Changing Looks customer base including the lucrative higher paying repeat 'big colour clients' business;
- the respondent would continue to forge and solidify a powerful personal connection with the customers while she was employed by the applicant; and

- there was risk that when the respondent left the applicant's employment Changing Looks customers would follow her.

Respondent's position on legitimate interest

36 The respondent's position on the existence of a legitimate interest in the present case was not entirely clear. She referred to the fact that her close customer connections had been crystallised before the sale of the business and that she was not obliged to work for the applicant after the sale. Nevertheless, the respondent decided to work for the applicant and signed the Employment Contract with the restraint covenants.

37 She and Stacey Lind also gave evidence generally consistent with the so-called 'relational attributes' of the close and personal connections between a hairdresser and customer set out at [2.5] of the applicant's written submissions.[9] The patterns of a hairdressing customer's behaviour generally also appeared to be uncontroversial.

38 The real dispute seemed to be whether the duration and extent of the restraint sought to be imposed on the respondent was reasonably necessary to protect the applicant's legitimate interest in the customer connections in the particular circumstances of this case.

Findings on legitimate interest

39 On balance, I was satisfied that the applicant had a legitimate interest in restraining the respondent at the date of the Employment Contract. The evidence establishes that:

- the applicant had, at the time of the Employment Contract, a legitimate interest to protect the customer connections it had acquired pursuant to the Sale Agreement and the risk that an employee of the applicant would use those connections to take business away from the applicant if they left;

- before the applicant purchased the Changing Looks business, it was operated as a close family run business for some 15 years. The majority of the Changing Looks customer base at the time of sale were repeat business customers, many of whom booked appointments into the future to secure the availability of a particular hairdresser or timing of a service;

- the respondent had been employed in the business for some 12 years before the sale and was well liked by customers. The respondent had developed a personal rapport and close connection with the lucrative 'big colour clients' who usually returned every 4-6 weeks and made advance bookings.

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[9] FDN 11.

40 I appreciate that the respondent had pre-existing close and personal customer connections and could have declined employment with the applicant after the sale and walked away from the Changing Looks salon without agreeing to any restraint covenants in favour of the applicant. But she didn't. The respondent accepted the applicant's offer of employment.

41 As an employee of the applicant, the respondent would, in the normal course of business, continue to forge and solidify her close and personal connections with the existing more lucrative customer base. In my view, the applicant had a legitimate interest to protect against the risk that the respondent would continue to be in a position to influence customers such that if she left the applicant's employment, she may be able to take some of those customers away 'and thereby substantially affect the proprietary interest of the employer in the goodwill of it's business…'.[10]

2. Did the Restraint Clause in its extent or duration do more than was reasonably necessary to protect the applicant's legitimate interest?

Contract interpretation principles

42 The principles of construction of provisions in written contracts are well established. An objective approach is to be adopted in determining the rights and liabilities of parties to a contract. A contract is to be construed by reference to what a reasonable person would understand by the language in which the parties have expressed their agreement, having regard to the context in which the words appear and the purpose and object of the transaction.[11] In the case of ambiguity, resort can be had to the surrounding circumstances known to the parties at the time of agreement in interpreting the particular provision.[12]

43 Further, where a covenant in restraint of trade in an employment contract is ambiguous, it will be construed in favour of the employee, so that a narrower construction of the scope of a restraint will be preferred to a broader construction.[13]

A. Extent of the restraint

(a) Language

44 The parties disagreed on the meaning of two key undefined words used in the Restraint Clause namely: 'divert' and 'customers'.

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[10] *Lindner v Murdock's Garage* (1950) 83 CLR 628, 636 (Latham CJ) cited with approval in *Birdanco Nominees Pty Ltd v Money* [2012] VSCA 64, [41] (Robson AJA) and *Wallis Nominees*, [22].

[11] *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 462 [22]; *Toll (FGCT) Pty Ltd v Alphafarm Pty Ltd* (2004) 219 CLR 165, 179 [40]; *International Air Transport Assn v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, 174 [53].

[12] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352; *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604, 605.

[13] *International Cleaning*, [18].

Meaning of divert

45 I was not referred to any legal authority where the concept of diversion had been the subject of judicial consideration.

46 The applicant argued that the concept of 'diversion' in the Restraint Clause is synonymous with the concept of 'solicitation'. The applicant says that, in simple terms, the word 'solicit' means 'to ask'. It says the word has other meanings such as 'to call for', 'to make a request', 'to petition', 'to entreat', 'to persuade', 'to prefer a request' and to **'divert'** (added emphasis).[14]

47 In support of this construction the applicant essentially relies on three things. First, the fact the Restraint Clause is positioned under the 'Non-Solicitation' heading in the Employment Contract. Second, the definition of 'divert' in the *Oxford Dictionary* i.e., 'to turn aside (a thing, as a stream, etc.) from its (proper) direction or course; to deflect (the course of something)'.[15] Third, the following passage in *Techforce* where Feutrill J discusses the concept of 'solicitation' at [18]:

> The concept of 'solicitation' has been the subject of judicial consideration in the context of restraint of trade clauses in a number of authorities. In simple terms, the word 'solicit' means 'to ask'. It has other meanings such as 'to call for', 'to make a request', 'to petition', 'to entreat', 'to persuade' and 'to prefer a request'. However, soliciting is not something which depends upon whether it is the former employee who telephones or arranges to meet the client, or the other way around. 'Rather, whether solicitation occurs depends upon the substance of what passes between them once they are in contact with each other. There is solicitation of a client by a former employee if the former employee in substance conveys the message that the former employee is willing to deal with the client and, by whatever means, encourages the client to do so': *Hellmann Insurance Brokers Pty Ltd v Peterson* [2003] NSWSC 242 at [11]-[12]. The person who makes the initial contact is not decisive. Nonetheless, not every positive response to an approach (or contact) by a client is solicitation of that client. The line is crossed where the former employee, in response to an approach, does not merely indicate a willingness to be engaged, but positively encourages the client to engage the former employee: *IceTV v Duncan Ross* [2007] NSWSC 635 at [44]-[47]. Thus, in context and substance, it is reasonably arguable that 'solicit or contact' means 'an interaction with a candidate or client by which Mr Jaffer conveys a willingness to deal with a candidate or client (whether on his own behalf or on behalf of another person) and encourages that candidate or client to do so'.[16]

48 The respondent does not accept that solicitation and diversion are synonymous terms. She says that diversion is a much wider concept as borne out by the passage from *Techforce* restated above.

49 The respondent says that solicitation involves a two-step test to see whether solicitation occurred. As a first step, the former employee in substance conveys

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[14] Applicant's written submissions, at [2.20].

[15] See also similar definition of 'divert' in the online Macquarie Dictionary, verb (t) 1. to turn aside from a path or course; deflect. 2. to set (traffic) on a detour. 3. to draw off to a different object, purpose, etc. 4. to distract from serious occupation; entertain or amuse.

[16] [2023] FCA 1674.

the message that they are willing to deal with the customer. The second step is to then encourage the customer to do so.

50 The respondent submits that solicitation requires more work than what is needed for a diversion. Diversion can occur entirely by way of the first step. It does not require encouragement.

Meaning of customers

51 The applicant relied on a plain-English meaning of the language used in the Restraint Clause. It rejected what it referred to as the respondent's 'somewhat convoluted definition of customer' and irrelevant 'subjective interpretation'. Nevertheless, the applicant's position on the exact meaning of 'customers' in the context of the intended scope of this restraint seemed to be somewhat fluid and remained unclear to me.

52 The respondent says that the reference to the applicant's customers in the Restraint Clause is ambiguous because it is impossible to discern what is meant by the word 'customers'. She says that presumably it meant current customers but that is not what the clause says. The respondent says that there is no clarity around how 'customers' would be identified. She says that it was not even clear from the applicant's own evidence when someone would be regarded as a customer for the purposes of the Restraint Clause.

53 The respondent says that a customer could include any person who obtained hairdressing services on a singular occasion and/or anyone who was at any time a customer of Changing Looks (i.e., at any time before the sale of the business to the applicant).

54 Ms Bullen conceded that she would not regard someone who had not been into the salon for 8 years to be a customer. Nonetheless, it appeared that she considered that there were some persons who had been to Changing Looks before the business was purchased, undefined by period or frequency, that were considered to be the applicant's customers.

55 The respondent also referred to the ambiguity arising from the restraint in respect of any business the Employer had 'attempted to solicit'.

Findings on language

56 The language used in the Restraint Clause differs to the more commonly used language of non-solicitation clauses. The breadth and lack of clarity of some of the language used in clause 28 stands in stark contrast to the specificity in the restraint covenants in clause 14 of the Sale Agreement. The latter provides definitions for key terms and concepts such as the client, business and competing business. It also uses concepts such as 'solicit' and 'entice' rather than 'divert'.

57 Interestingly, the client is defined in cl. 14.1(a) of the Sale Agreement as a person who was, in the 12-month period before the completion date of the sale, a customer or client of the business sold to the applicant. The Sale Agreement also provides a cascading period of restraint of 3 years, 2 years and 1 year in the event that the longer periods are unreasonable and need to be read down.[17]

58 While not determinative of the proper construction of the Restraint Clause, the restraint covenants agreed to by the applicant in the Sale Agreement are part of the general factual matrix in which the Restraint Clause is to be construed given the similar legitimate interests of the applicant that are sought to be protected by the restraint covenants in the Sale Agreement.

59 In my view, undefined terms or concepts such as 'divert', 'customers' and 'business' are plainly open to different meanings as was evident from Ms Bullen's evidence. Nor is there clarity as to the scope of activity captured by the expression 'any business the Employer had … attempted to solicit, from its customers…'.

60 I agreed with the respondent's submissions to the effect that the concept of 'diversion' is not synonymous with the concept of 'solicitation' and that diversion captures a wider range of activities than solicitation and does not require any positive act of encouragement.

61 The 'Non-Solicitation' heading is irrelevant because clause 58 of the Employment Contract expressly provides that headings are inserted for convenience and are not to be considered when interpreting the contract.

62 Nor is there anything in the passage in *Techforce* relied upon by the applicant that supports the applicant's extended definition of solicitation to include to 'divert'.

(b) Surrounding circumstances

63 It was not clear from the evidence whether the respondent knew how much the applicant intended to pay her sister and mother on the sale of the Changing Looks business or how much of the purchase price was attributed to goodwill. Nevertheless, at the date of the Employment Contract, the respondent had worked in the family business for some 12 years. She knew the nature and make up of the Changing Looks customer base and of the close and personal customer connections between the customer base and hairdressers employed by the Vendors. The respondent also knew that the applicant purchased the business as a going concern and intended to operate the business effectively on a business as usual basis by employing the hairdressers previously employed by the Vendors as well as the respondent's sister, Stacey.

64 Other relevant circumstances known to the parties at the time included that:

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[17] Item 26 of Schedule 1.

- the respondent was employed on a casual basis without entitlements to paid leave (as per her previous terms of employment) and could be terminated on a day's notice;

- there was no negotiation between the parties of the extensive terms and conditions set out in the Employment Contract. The 12 page legally drafted offer document was presented by the applicant to the respondent for completion and signature without discussion of the Restraint Clause;

- the Employment Contract included other restraint of trade terms in addition to the Restraint Clause;[18]

- the Employment Contract did not provide for any specific compensation to be paid to the respondent in connection with her agreeing to the two-year period in the Restraint Clause or in respect of any other restraint covenant. The consideration received by the respondent was essentially her continued employment at the Changing Looks salon on a casual basis for the same hours and remuneration as per her prior employment with the Vendors (or possibly at an hourly rate of $1.80 higher than the applicable Hairdresser's award rate).

65 I have also had regard to my overall impression of Ms Bullen and the respondent when giving evidence at trial. Ms Bullen appeared to be a confident business owner and gave evidence in a forthright manner. In contrast, the respondent gave evidence that she found Ms Bullen intimidating. I found some aspects of the respondent's evidence about her understanding of the restraint covenants at the time she signed the Employment Contract was either subconsciously or intentionally given with self-interest in the outcome. In my view, the respondent appeared to downplay her understanding of the contractual terms. Nonetheless, it was my assessment that the respondent genuinely did not fully understand the extent of the restraint covenants that she was agreeing to in the Employment Contract. Likewise I did not consider that Ms Bullen fully understood the scope of the Restraint Clause as was evident by her evidence about who was a customer for the purposes of the restraint.

66 The Employment Contract was a relatively long and unwieldy document for a lay person to read and understand in its entirety. There was no evidence that Ms Bullen suggested or encouraged the respondent to seek legal advice before signing the offer document. Ms Bullen also gave evidence that the respondent was the only employee that had not returned the signed document. The other employees had apparently routinely signed the offer document and returned it to her on the first trading day after having copies given to them the week prior.

67 While not suggesting any untoward or improper conduct on part of Ms Bullen, I accepted the respondent's evidence that she felt some pressure from Ms

[18] See clauses 23-42 including restraints dealing with confidential information.

Bullen to sign the document on 24 December 2022 before the Christmas closure (and prior to having her partner's mother read it).

(c) Purpose or object of the contract

68 A key purpose or object to be secured by the Employment Contract as a whole appeared to be to protect the goodwill acquired by the applicant under the Sale Agreement, primarily comprised of the existing customer connections enjoyed by the Specified Employees and Stacey Lind by (i) retaining the hairdressers that had been employed in the Changing Looks business with those connections; and (ii) imposing restraint of trade covenants including but not limited to the Restraint Clause on her employees to protect the customer connections from being damaged if they ceased employment with the applicant.

(d) Conclusion on extent of restraint

69 Ultimately, I have concluded that a reasonable person would have understood the Restraint Clause to mean that the respondent agreed not engage in any activity for a two-year period after termination of her employment with the applicant that caused or may cause a customer of the applicant to go elsewhere for hairdressing services that had been or could be obtained from the applicant. The activity did not require a positive step of encouragement to breach the Restraint Clause.

70 As to the identity of the applicant's customers, I considered that it was appropriate to apply a narrow construction in favour of the respondent (as the Court is required to do in the case of ambiguity). The express terms of the Restraint Clause refer only to any business the applicant had enjoyed etc., from 'its customers'. The *Macquarie English Dictionary* defines 'customer' as 'someone who purchases goods from another; a buyer; a patron'.[19] I concluded that the applicant's customers referred to a person who had purchased hairdressing services from the applicant, as distinct from the Vendors, even if only on a single occasion in the period commencing on 20 December 2022 (when the applicant first commenced trading) and ending on 29 April 2023 when the respondent ceased her employment with the applicant.

71 Once the customer is identified this way, the balance of the restraint concerning any business that the applicant 'attempted to solicit' from its customers can be understood to mean any services that the applicant offered at the Changing Looks salon over the same period. In this regard, those services can be identified from the applicant's price lists for services offered over this period.

B. Is the two year restraint period reasonable?

Applicant's position

72 The applicant primarily relies on the case of *NE Perry Pty Ltd v Judge*[20] which upheld the enforceability of a two-year restraint period for non-solicitation

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[19] https://app.macquariedictionary.com.au/?search_word_type=dictionary&word=customer; noun 1.
[20] [2002] SASC 312 ('*NE Perry*').

to protect the business interest of the applicant in that case from the strong connection formed between the respondent in that case (Dr Judge), and his patients.

73 The applicant says that there is a sufficient similarity between the patterns of behaviour and the nature of the relationship that exist between a chiropractor and their patients/clients and a hairdresser and their customers. The similarities in the relational attributes are described at [2.5] of the applicant's written closing submissions as follows:

> 2.5.1 Trust and confidentiality - Both relationships are built on a foundation of trust, where the client or customer must believe in the professional's ability to meet their needs. ***This trust is cultivated over time*, *often through repeated interactions***. Additionally, both professionals often become confidants, privy to personal stories and information.
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> 2.5.2 Personal interaction and communication - In both cases, the quality of the outcome is heavily dependent on the effectiveness of communication. The ability to listen, understand, and respond to the client's or customer's needs and preferences is central to the success of the service.
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> 2.5.3 Customization of service - Both professionals must adapt their services to meet the unique needs and preferences of each individual, requiring a deep understanding of their field and the ability to apply it in a personalized way.
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> 2.5.4 Continuity of service - Both relationships benefit from continuity, as it enhances the ability to provide personalized and effective service. Regular interactions foster a deeper understanding of the client or customer, leading to better outcomes.
>
> 2.5.5 Physical and emotional impact - Both relationships have the potential to profoundly affect the individual's physical and emotional state. Whether through health improvements or aesthetic changes, the outcome can significantly influence the individual's sense of well-being and self- confidence.
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> 2.5.6 Being in the client's personal space (i.e. close and personal contact) - In both cases, the chiropractor or hairdresser's presence in the client's or customer's personal space is not just a necessity of the service; it is a cornerstone of the relationship. The trust clients and customers place in these professionals is not only in their technical abilities but also in their capacity to navigate this intimacy with respect and care.
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> 2.5.7 The ability to make someone feel comfortable while in their personal space is a skill that both chiropractors and hairdressers must master. It involves understanding non-verbal cues, respecting personal boundaries, and creating an environment where the client or customer feels safe and respected.
>
> 2.5.8 This closeness can also facilitate a deeper connection, allowing the chiropractor or hairdresser to better understand and meet the individual's needs. It can lead to more personalized service and, over time, build a loyal client or customer base.
>
> (Original emphasis.)

74 The applicant says that these relational attributes forge and solidify a powerful personal connection between a hairdresser and their clients, generally.

75 The applicant submits that, given the significant similarities between the connection described in *NE Perry* and the applicant's claim, there is sufficient nexus for the reasoning and principles discussed by Doyle CJ to apply to the applicant's claim:

> It seems to me that all the Court can do is consider the period of time reasonably required to sever or to substantially erode the connection between the [Respondent] and most of the patients, recognising in doing so that the strength of that connection in any particular case cannot be measured.[21]

Respondent's position

76 As already mentioned, the evidence of the respondent and her sister generally supported the existence of the asserted relational attributes between a hairdresser and her clients. However, the respondent did not agree that there was a sufficient nexus between the nature of the chiropractor practice and their patients and a hairdresser and their customers to justify a two-year restraint on non-solicitation.

77 The respondent argued that, consistent with the case of *NE Perry*, the reasonableness of the period of restraint will necessarily be governed by the number of repeat customers compared with the number of new customers, and the greater the number of repeat customers and the more frequently they return, the less time it will normally take to ameliorate the respondent's influence.

78 The respondent says that the pattern of repeat hairdressing customers is different to the repeat patients of a chiropractor practice. She says that while there was no evidence of the pattern of repeat patients in the *NE Perry*, it was suggested that some of the patients did not attend for a period of up to 12 months.

79 The respondent says that consistent with *NE Perry,* a restraint of greater than 6 weeks would be unreasonable on the uncontentious facts of this case or 3 months at the absolute outer limit.

80 The respondent further submitted that no higher Court in Australia has considered a two-year restraint period reasonable from 2016 to 2023 and the upper limit was 12 months for senior management or executives on a considerable salary or bonus. In support of this submission, the respondent relied on a table published in the *UNSW Law Journal* summarizing decisions since 1 July 2016 until 22 February 2023 at the Supreme or Federal Court level or above in which a Court made a final determination about the reasonableness of the duration of an employee non-compete restraint.[22]

81 The respondent also referred to the decision in *Avant Group Pty Ltd v Kiddle*[23] which stated that an 18-month restraint period may be reasonable because the

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[21] *NE Perry Ltd v Judge* [2002] SASC 312, [32].

[22] Respondent's Closing Submissions at [2] citing Andrew Fell and Elizabeth Rudz, 'Employee Non-Compete Restraints: Resolving Uncertainty' (2023) 46(4) *UNSW Law Journal* 1252, 1279, Table 1.

[23] [2023] FCA 685 ('*Avant*').

customers in that case would not return for at least a year at a time. *Avant* concerned government grants which were generally considered every 12 to 18 months.

82 The respondent also identified 'a bit of a shopping list' of other differences between her circumstances and those of Dr Judge including that:

- the Restraint Clause was in an employment contract (in respect of which the Courts have taken a stricter approach to restraints), whereas the case of *NE Perry* concerned a contractor who had been engaged to provide chiropractic services to patients at the business owner's practice in a country town under a fixed term contract for three years with a right of renewal for a further two years;[24]

- the respondent was employed in a metropolitan area on a casual 24-hour basis for a relatively low wage without entitlements to paid leave, whereas Dr Judge's remuneration included a commission of up to 60% of the profits of the applicant company;[25] and

- the respondent had been employed in the Changing Looks business before the applicant acquired the business and she had pre-existing close and personal customer connections, whereas Dr Judge was introduced to all of the clients by the applicant company.[26] The respondent did not need the 53 days that she worked for the applicant to crystallize the customer connections.

83 In summary, the respondent argued that considerable weight should be given to the fact that she: (i) was a low paid casual worker that could be dismissed on a day's notice; (ii) had already established close customer connections before she started work for the applicant; (iii) was not bound to accept the employment offer and could have simply left when the sale was completed; and (iv) received no consideration or payment in connection with the restraint period.

Findings on the reasonableness of the two-year restraint

84 The proper test as to whether the two-year period is reasonable is the period of time required to sever the connection between the respondent and the applicant's clients with whom the respondent dealt with.[27] The authorities make it clear that each case turns on its own facts. As noted in *Wallis*, the difficulty is making '[a] comparison with other situations where a restraint of trade has been found to be reasonable is necessarily limited. Each situation has its own unique set of facts and the restraints in question will be different'.[28]

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[24] *NE Perry*, [86] – [87].
[25] *NE Perry*, [10].
[26] *NE Perry*, [22], [35].
[27] *International Cleaning Services* [37] (Stanley J) citing *NE Perry* [28] – [30].
[28] *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657, [63].

85 Based on my consideration of the facts and circumstances relating to the applicant's business, the nature of the applicant's interest to be protected and respondent's customer connections as at the date of the Employment Contract as outlined earlier in these reasons and briefly summarised below, I have concluded that a two-year period is significantly longer than what was reasonably necessary to protect the legitimate interests of the applicant.

86 The customer base of the Changing Looks business at the time the applicant acquired the business largely comprised of long-standing repeat customers many of whom booked appointments into the future to secure the availability of a particular hairdresser or service, such as colour, every 4 to 6 weeks.

87 The customer base included considerably less first time 'new' or non-repeat customers.

88 A customer might be booked in with two different hairdressers on the same visit to the salon to provide different elements of the hairdressing services (e.g., the respondent would apply the colour and another employee would wash and blow dry).

89 Customers might book with any one of the hairdressers in the relatively small group of hairdressers working at the salon if their preferred hairdresser was not working or unavailable on the desired day and time.

90 A hairdresser would usually be able to establish a connection with a 'new' customer, if not on the first appointment, by the second appointment.

91 In my view, these key aspects of the patterns of customer behaviour suggest that the repeat customer base were exposed to more than the respondent in the usual course and that ordinarily a close connection could be formed by another hairdresser by the second appointment at the latest.

92 These matters are relevant to the time reasonably required to sever the respondent's customer connections and ability to influence customers to leave the applicant.

93 Given the heavy reliance placed by the applicant on the *NE Perry* case, I make the following further brief observations about the distinguishing features between the facts in that case and the case at bar.

94 First, there was only 'the most rudimentary evidence' adduced in *NE Perry* about the nature of the practice and consulting habits of its patients showing that there was some repeat forward bookings one, two and three weeks ahead. There was no evidence about the frequency at which, or the period of time over which, patients returned for further treatment.

95 In the present case, there was no evidence to suggest that it was common for a Changing Looks customer to return at intervals of a year or more. To the

contrary, the evidence established a large number of repeat customers returning at intervals of between 4-6 weeks.

96 Second, the non-solicitation restraint clause in the *NE Perry* case was not in an employment contract. Dr Judge was engaged as an independent contractor for a period of three years and paid a percentage of gross takings. The respondent in this case was a low paid casual employee whose employment could be terminated upon a day's notice.

97 Third, the non-solicitation restraint clause in *NE Perry* was materially different to the Restraint Clause. Among other things, the restraint clause in *NE Perry* prohibited Dr Judge seeking to 'induce any client of the Clinic to become a client…'.[29] *NE Perry* contained a reference to the 'client list relating to the Clinic'.[30] It did not include undefined concepts such as diversion of customers. The Restraint Clause covered a much broader range of activities than the scope of restraint in *NE Perry*.

Conclusion on whether Restraint Clause was reasonable

98 For the reasons outlined above, I have concluded that the Restraint Clause in both its extent and duration did more than was reasonably necessary to protect the applicant's legitimate interests on the facts of this case. In my view, the Restraint Clause is void and unenforceable against the respondent.

Orders

1. Claim dismissed.

2. The matter is listed at 10 am on 2 May 2024 to hear the parties on the question of the costs of action.

3. Registry is to email a copy of these reasons for Judgment and record of outcome with these orders to the parties.

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[29] *NE Perry,* [11].
[30] *NE Perry*, [43], [45].