of access which the Act confers. Because of the stated objects of the FOI Act, the dissenting judges considered that it was misleading to describe the minister's decision under s36(3) as involving a 'balancing' of public interest factors. Instead, the minister's decision on the public interest and the question of reasonableness that is considered by the AAT must operate in the context of the legislature's clear intention to confer on the public a general right of access.

The decision of the majority leaves little scope for challenging a certificate issued by a minister under s36(3). A certificate may be set aside by the AAT if it can be established that there are in fact no reasonable grounds to support the asserted claim, but otherwise it will not suffice to point to countervailing factors in favour of disclosure. Alternatively, as suggested by the majority judges in the High Court, a certificate may be challenged in judicial review proceedings. It is possible that the latter course will provide a more fruitful avenue of attack for those faced with a conclusive certificate, despite the usual limitations of judicial review.

By Stephen Free

Post employment restraints

By Arthur Moses and Tony Saunders

In 2006 the Supreme Court has been called upon to deal with an increasing number of applications for interlocutory injunctions to enforce post employment restraints contained in contracts of employment. Four such recent cases are summarised below.

Cactus Imaging Pty Limited v Peters [2006] NSWSC 717

Cactus Imaging Pty Limited's (*Cactus*) former New South Wales Sales Manager, Mr Peters, commenced employment with its chief competitor, Metro Media Technologies Inc (MMI), approximately six months after resigning from his employment with Cactus.

Cactus did not seek to prevent Mr Peters from remaining in the employment of MMI, notwithstanding that the contractual restraint, if enforced, would do so. Instead, Cactus sought to have Mr Peters restrained from disclosing Cactus's confidential information; and, for a period of twelve months following the end of his employment, from canvassing soliciting or endeavouring to entice away from Cactus any persons who were its clients or customers during the year before Mr Peters' departure, from soliciting or enticing away from Cactus any employee consultant or contractor of Cactus, and from counseling, procuring or otherwise assisting any person to do any of those acts. An interlocutory injunction to that effect was granted, by Gzell J, on 22 March 2006, and the hearing was expedited.

At the final hearing, Brereton J emphasised that a plaintiff who seeks to restrain a former employee from using confidential information must be able to identify with specificity, and not merely in global terms, the relevant information.[1] One reason for this is that an injunction in general terms restraining a former employee from using the employer's 'confidential information', would inappropriately leave, to an application for contempt, determination of whether particular information was or was not confidential.

Brereton J held that Mr Peters had access to Cactus's confidential information, including information as to internal costs and pricing rates, optimal operating speeds of Cactus's printing equipment and the functions and details of the production scheduling software used by Cactus.

By reason of Mr Peters' knowledge of Cactus's New South Wales clientele, their needs and idiosyncrasies, Brereton J held that Cactus had a legitimate protectable interest in its customer connection.[2]

Brereton J concluded that the contractual provision prohibiting Mr Peters from canvassing, soliciting or endeavouring to entice away from Cactus any of its clients was supported, not only by protection of customer connection, but also by protection of confidential information.[3] Those legitimate protectable interests would have also supported the provision prohibiting Mr Peters from working for a competitor, had Cactus sought to enforce it.[4]

As to the duration of the restraint, Brereton J relied upon the following factors in finding that the period of twelve months was not excessive: first, that is what the parties agreed; secondly, at least for lower volume customers, it would probably take 12 months for a replacement to prove his or her competence and establish a rapport with the customer; thirdly, insofar as the restraint protects confidential information, knowledge of Cactus's pricing parameters and marketing strategies might well afford the employee an unfair advantage for as long as twelve months after separation; and fourthly, albeit slightly, that one of Mr Peters' fellow employees at Cactus had a similar restraint.[5]

Brereton J reviewed the authorities on non-recruitment covenants and concluded that although the more recent cases tended to support such covenants on the basis of protection of confidential information, they were also supported by staff connection, which constitutes part of the intangible benefits that may give a business value over and above the value of the assets employed in it, and thus comprises part of its goodwill.[6] Because the non-recruitment covenant was supported by both staff connection and confidential information, Brereton J held that a restraint period of twelve months was reasonable.[7]

John Fairfax Publications Pty Limited v Birt [2006] NSWSC 995

In this case Brereton J was called upon to consider contractual restraints prohibiting John Fairfax Publications Pty Limited's (Fairfax) former general manager of sales, Mr Birt, for a period of six months, from approaching any employee, agent or customer of Fairfax with a view to enticing them away from Fairfax; for a period of three months, from carrying on or being engaged or interested in, in any capacity, including as an employee, or being otherwise associated with any business which is in competition with the Fairfax Group; or, at any time, using any confidential information of Fairfax. In addition, Fairfax sought to restrain Mr Birt's new employer from inducing or requiring him to engage in any of the activities from which he was restrained.

Brereton J considered two primary questions: first, whether Fairfax had a legitimate protectable interest; and second, whether the restraint was no more than reasonable for the protection of that interest.

As to protectable interests, Brereton J held that Fairfax had three such interests:

- confidential information (which Mr Birt effectively conceded by offering an undertaking not to disclose certain information);
- customer connection; and
- staff connection.[8]

These interests supported the contractual restraints, save for the protection against solicitation of agents, in respect of which there was no evidence to permit a finding that Fairfax had any relevant connection with its agents.[9] Brereton J also held that the restraint periods were reasonable in the circumstances.

In considering discretionary factors, Brereton J concluded that, in the context of restraints of trade, damages are rarely a sufficient remedy.[10] In addition, after expressing sympathy for Mr Birt's predicament (namely, the prospect of being out of employment for three months), his Honour expressed the view that, 'to a significant extent, an employee who pursues such employment despite the terms of a restraint is the author of his or her own misfortune'.[11] An injunction was granted in the terms sought against Mr Birt.

Brereton J also held that a case had been made out for an interlocutory injunction restraining two entities within the new employer's group of companies from inducing Mr Birt to breach his contractual obligations with Fairfax.[12] That finding was made on the basis that Mr Birt's new employer was placed on notice of his contractual obligations to Fairfax shortly after his resignation. In the face of that notification, the new employer continued to pursue the employment of Mr Birt.

Russ Australia v Benny [2006] NSWSC 1118

In this case Justice Campbell granted an interlocutory injunction restraining Ms Benny, a former national sales manager of Russ Australia Pty Limited (Russ), from acting as an employee of one of Russ' competitors in the gift and toy industry for a period of six months.

Campbell J held that Russ had a legitimate interest in protecting its confidential information, staff connection and customer connection.[13] His Honour also made reference to the practical difficulties faced by an employer in seeking to protect itself against activities of a former employee which encroach on its legitimate interests by obtaining a specific covenant against solicitation of customers, or solicitation of employees; namely, it is often difficult for a former employer to know, or to be able to establish, that a breach of such a covenant has occurred.[14] In making these comments, Campbell J referred to Lord Denning's decision in *Littlewoods Organisation Limited v Harris*:[15]

> Experience has shown that it is unsatisfactory simply to have a covenant against disclosing confidential information, because it is difficult to draw the line between information which is confidential and information which is not, and very difficult to prove a breach when the information is of such a character that an employee can carry it away in his or her head, so that the only practicable solution is to take a covenant from the employee by which he or she undertakes not to work for a trade rival.

These practical difficulties were the primary reason for Campbell J's refusal to grant injunctions prohibiting Ms Benny from soliciting or endeavouring to entice away from Russ any client of Russ with whom she had dealt or otherwise had contact with in the course of her employment with Russ. In particular, Campbell J held that:

(a) the phrase 'clients with whom you have dealt' would include clients with whom the dealing was of a passing nature. To that extent, the clause went further than protecting legitimate interests of the employer, and hence would be invalid at common law;

(b) it was therefore necessary to consider whether the clause could be read down under the *Restraints of Trade Act 1976 (NSW)*. To apply that Act, one needs to look at the particular breach, and determine whether the application of the restraint to that breach is contrary to public policy; and

(c) in circumstances where Ms Benny had given undertakings not to solicit business from four particular clients with whom she had made contact since commencing work at her new employer, Russ was not able to provide any evidence of any actual breach of Ms Benny's obligation not to solicit business from any other 'clients with whom she had dealt'. As a consequence, Russ was not able to demonstrate that the non-solicitation covenant could be saved by the application of the Restraints of Trade Act. [16]

Campbell J applied the same analysis to a covenant prohibiting solicitation of employees, including employees with whom Ms Benny

had no significant contact. Because the covenant was, on its face, wider than necessary to protect the legitimate interest of Russ, evidence of breach was necessary in order for the covenant to be saved under the Restraints of Trade Act.[17] No such evidence was available.

In contrast to Brereton J's decision in *John Fairfax Publications Pty Limited v Birt* [2006] NSWSC 995, Campbell J declined to grant an injunction prohibiting Ms Benny's employer from inducing Ms Benny to breach her post employment contractual restraints. Campbell J's decision in this regard was based on his finding that, although the managing director of Ms Benny's new employer knew about the terms of Ms Benny's previous contract of employment at the time he employed her, he held a bona fide belief reasonably entertained that the employment of Ms Benny would not result in her breaching her contract of employment with Russ. The managing director's belief was based on his opinion that his business did not compete with that of Russ.

Linwar Securities Pty Ltd v Christopher Savage [2006] NSWSC 786

This case involved an application by Linwar Securities Pty Ltd (Linwar) for an interlocutory injunction to restrain Mr Savage, its former employee, from commencing employment or becoming engaged in any other capacity with Goldman Sachs J B Were (Goldman), a competitor.

In order to appreciate Nicholas J's decision, it is necessary to understand a little about Linwar's business and Mr Savage's duties as an employee. Linwar's principal activities include providing institutional investors, such as superannuation fund managers, with information and advice about ASX-listed companies to assist in making investment decisions. In his role with Linwar, Mr Savage's duties included identifying small to medium companies believed by him to be undervalued or overvalued which provide buying or selling opportunities for Linwar's clients. He was required to estimate the fair value of companies, produce a written research report which included a summary of information about the company and his valuation, and then market his research to Linwar's clients.

Linwar sought to support the restraint by reference to two protectable interests: confidential information and customer connection. Nicholas J held that the evidence did not establish actual or threatened use of Linwar's confidential information by Mr Savage.[18]

As to the claim for relief based on customer connection, Nicholas J had regard to the fact that Mr Savage was in contact with the client institutions which traded through Linwar. In particular, Mr Savage spoke to their representatives from time to time to explain his research reports, thereby assisting them in making investment decisions. He met them on social occasions, and on occasions conducted by Linwar to discuss the performance of companies the subject of his analyses and reports.

Notwithstanding this evidence, Nicholas J concluded that it fell short of establishing that Mr Savage's relationship with Linwar's clients gave rise to a protectable interest.[19] His Honour held that the client relationship (customer connection) was essentially incidental to Mr Savage's principal activity as an analyst and researcher. Mr Savage's success was the product of his own skill and judgment; he did not have personal knowledge of, or influence over, any clients gained in his employment which could have been used to the detriment of Linwar. Nicholas J concluded that it was Mr Savage's skill and knowledge, and the high quality of his reports, which were likely to be attractive to clients, rather than any special relationship attributable to his employment with Linwar.[20]

Concluding analysis

It is apparent from the number of recent restraint of trade cases before the Supreme Court that, in the current economic environment, employers are more willing to seek the enforcement of post employment restraints. The success of such actions depends largely upon whether the employer has any legitimate protectable interests and, if so, whether the restraints are no more than is reasonable for the protection of those interests.[21]

1 *Cactus Imaging Pty Limited v Peters* [2006] NSWSC 717 at [14].

2 ibid., at [25], [28], [29].

3 ibid., at [34].

4 ibid., at [34].

5 ibid., at [42].

6 ibid., at [43] - [55].

7 ibid., at [63].

8 *John Fairfax Publications Pty Limited v Birt* [2006] NSWSC 995 at [27] - [41].

9 ibid., at [35] - [41].

10 ibid., at [45].

11 ibid., at [51].

12 ibid., at [54].

13 *Russ Australia v Benny* [2006] NSWSC 1118 at [40].

14 ibid., at [44].

15 [1977] 1 WLR 1472 at 1479.

16 ibid., at [30] - [32].

17 ibid., at [37].

18 *Linwar Securities Pty Ltd v Christopher Savage* [2006] NSWSC 786 at [33].

19 ibid., at [36].

20 ibid., at [39].

21 The most recent judgment of the NSW Court of Appeal dealing with post employment restraints of trade is *Woolworths Limited v Mark Konrad Olsen* [2004] NSWCA 372. The judgment in a concise manner sets out the relevant principles which will guide the exercise of the discretion set out in section 4(1) of the *Restraints of Trade Act 1976* (NSW) when employment contract cases are being litigated: see [38] - [46] per Mason, P (with whom McColl and Bryson, JJA agreed). See also Moses A 'Restraints of Trade in NSW' (2004) 1 UNELJ pp 200 - 223.