Federal Court of Australia

United Petroleum Pty Ltd v Barrie [2022] FCA 818

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| File number: | VID 34 of 2022 |
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| Judgment of: | **SNADEN J** |
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| Date of judgment: | 21 March 2022 |
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| Date of publication of reasons: | 15 July 2022 |
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| Catchwords: | **INDUSTRIAL LAW** – employment – restraint of trade - application for interlocutory injunctive relief – enforceability of post-employment restraint - whether there is a prima facie case that favours injunctive relief – whether the balance of convenience favours injunctive relief – whether former employee should be restrained from employment – whether scope and duration of contractual term reasonable to protect legitimate interest – contractual term restraining “disclosure of confidential information” for advantage – contractual term restraining business activity – application for interlocutory relief dismissed |
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| Legislation: | *Corporations Act 2001* (Cth) s 183  |
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| Cases cited: | *Just Group Ltd v Peck* (2016) 344 ALR 162*Liberty Financial Pty Ltd v Jugovic* [2021] FCA 607*Metro Trains Melbourne Pty Ltd v Australian Rail, Tram and Bus Industry Union* [2019] FCA 1265  |
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| Division: | Fair Work Division |
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| Registry: | Victoria |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 23 |
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| Date of hearing: | 21 March 2022  |
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| Counsel for the Applicant: | Mr R A Millar |
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| Solicitor for the Applicant: | Gadens |
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| Counsel for the Respondent: | Ms R Preston |
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| Solicitor for the Respondent: | Corrs Chambers Westgarth |

ORDERS

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|  | VID 34 of 2022 |
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| BETWEEN: | UNITED PETROLEUM PTY LTDApplicant |
| AND: | JUSTIN BARRIERespondent |

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| order made by: | SNADEN J |
| DATE OF ORDER: | 21 MARCH 2022 |

THE COURT ORDERS THAT:

1. The applicant’s application for interlocutory relief contained within the originating application of 21 January 2022 is dismissed.
2. The costs of and associated with the application be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

Ex tempore

(Revised from transcript)

SNADEN J:

1. On 21 March 2022, at the conclusion of a contested interlocutory hearing, I gave *ex tempore* reasons for refusing the applicant’s application for interim injunctive relief against its former employee, the respondent. I indicated at the time that I would endeavour to supplement those reasons with more fulsome, written reasons for so deciding. In light of my ruling, orders were agreed and made, including as to costs (which were reserved).
2. Immediately after so ruling, counsel for the unsuccessful applicant indicated on behalf of his client that the *ex tempore* reasons that had been given were understood and that, so far as his client was concerned, it was not necessary to produce any written elaboration. Counsel for the respondent, however—despite her success—indicated that the respondent “…would like written reasons…to elaborate on exactly—and given that costs are reserved, also down the track, for where we go with this in due course, depending on how [the applicant] approaches”.
3. I thereafter indicated that written reasons would be provided, albeit not with the urgency that might otherwise attach to that endeavour. By these reasons, I discharge that undertaking.
4. The applicant operates a wholesale and retail fuel supply business. At the retail level, it consists of fuel stations and convenience stores located throughout Australia. At the wholesale level, it is involved in the marketing and supply of automotive and other fuels to businesses nationally.
5. The respondent is a former employee of the applicant’s business. Until January 2022, he was engaged in the role of “Queensland Wholesale State Manager” (later known as “Business Development Manager”). At the time that his employment ended, he commanded an annual salary of $145,000, plus superannuation and a vehicle allowance. In December 2021, the respondent gave notice of his resignation in order that he could assume the position of “Sales Manager, Aviation” with a different employer, IOR Services Pty Ltd (“**IOR**”). IOR also operates within the petroleum products sector.
6. Prior to his resignation, the applicant employed the respondent pursuant to a written employment agreement. Its terms included one that purported to restrain the respondent from engaging in certain types of work after his engagement with the applicant was brought to an end. By its originating application—and by the application for interlocutory injunctive relief contained therein (which was heard and determined on 21 March 2022)—the applicant seeks (and sought), amongst other things, to enforce that term. It also seeks (and sought) to restrain the respondent from breaching duties that are said to be owed pursuant to the *Corporations Act 2001* (Cth) (the “**Corporations Act**”).
7. The application for interlocutory relief came before a duty judge in January 2022. For reasons that don’t require elaboration here, it was adjourned upon the respondent’s undertaking that he would not commence in his new role with IOR. That undertaking was honoured, as were consent orders regarding the filing and service of evidence and submissions concerning the application for interlocutory relief.
8. That application ultimately came before me on Monday, 21 March 2022. The applicant relied upon two affidavits sworn by its Chief Executive Officer, Mr David Szymczak: one dated 21 January 2022 and the other dated 9 February 2022. Each was read subject to a handful of evidential objections that were resolved at the time (and that need not here be particularised). The respondent likewise read two affidavits that he affirmed: one on 2 February 2022 and the other on 17 March 2022.
9. Additionally, the parties filed written submissions, by which the court was greatly assisted.
10. There was no controversy between the parties concerning the principles that the court should apply in considering whether or not to grant the interlocutory relief for which the applicant moved. In *Metro Trains Melbourne Pty Ltd v Australian Rail, Tram and Bus Industry Union* [2019] FCA 1265, I summarised them as follows (at [38]-[41]):

…[T]he principles that govern the court’s discretion to grant interlocutory injunctive relief are well-settled and not in dispute. In order to qualify for the relief that it seeks, Metro Trains must demonstrate that it has a *prima facie* case and that the balance of convenience favours the grant of an injunction: *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57, 81-84 (Gummow and Hayne JJ, with whom Gleeson CJ and Crennan J agreed).

When considering the grant of an interlocutory injunction, the issue of whether an applicant has established a *prima facie* case and whether the balance of convenience favours injunctive relief are related inquiries. Whether there is a *prima facie* case is to be considered together with the balance of convenience: *Samsung Electronics Co. Ltd v Apple Inc.* (2011) 217 FCR 238, 261 [67] (Dowsett, Foster and Yates JJ).

In *Bullock v FFTSA* (1985) 5 FCR 464, Woodward J (with whom Smithers and Sweeney JJ relevantly agreed) stated (at 472):

…an apparently strong claim may lead a court more readily to grant an injunction when the balance of convenience is fairly even. A more doubtful claim (which nevertheless raises “a serious question to be tried”) may still attract interlocutory relief if there is a marked balance of convenience in favour of it.

An applicant for interlocutory injunctive relief must, in showing that the balance of convenience favours that outcome, point to inconvenience for which an award of damages at trial would not be a sufficient remedy: *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153 (Mason ACJ); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Blue Star Pacific Pty Ltd* (2009) 184 IR 333, 339 (Greenwood J).

1. Clause 7.1 of the respondent’s former contract of employment contains the post-employment restraints that the applicant sought to enforce. By that clause, the respondent agreed that he would not:

(a) be engaged, involved or materially interested in any activity for or on behalf of a business, firm or undertaking of substantially the same kind as [he] performed during [his] employment with the [applicant], in which use or disclosure of confidential information may be useful or advantageous to the business, firm, undertaking or to [him];

… [and]

(e) carry on, advise, provide services to or be engaged, concerned or interested in or associated with or otherwise involved in any business activity that is competitive with any business carried on by the [applicant].

1. In each case, the restraint was to operate “during the restraint period in the restraint area”. Each of those concepts adopted a familiar “cascading” definition that needn’t here be stated.
2. The applicant also relied upon s 183(1) of the Corporations Act, which provides as follows:

**183 Use of information—civil obligations**

*Use of information—directors, other officers and employees*

(1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

1. As with the principles governing the granting of interlocutory injunctive relief, there was no dispute between the parties as to the circumstances in which post-employment restraints may lawfully be enforced. As a general proposition, clauses in restraint of trade are presumed void; but that presumption may be rebutted where it might be said that circumstances render a particular clause reasonable as between the parties and not unreasonably contrary to the public interest: *Just Group Ltd v Peck* (2016) 344 ALR 162, 173-175 [30]-[36] (Beach and Ferguson JJA and Riordan AJA); *Liberty Financial Pty Ltd v Jugovic* [2021] FCA 607, [194] ([Beach J).
2. In *Just Group Ltd v Peck*, the Victorian Court of Appeal made the following relevant observations (at 174 [33]-[35]):

A restraint clause in favour of an employer will be reasonable as between the parties, if at the date of a contract:

(a) the restraint clause is imposed to protect a legitimate interest of the employer; and

(b) the restraint clause does no more than is reasonably necessary to protect that legitimate interest in its:

(i) duration; or

(ii) extent.

It is well established that employers do have a legitimate interest in protecting:

(a) confidential information and trade secrets; and

(b) the employer’s customer connections.

For the legitimate purpose of protecting the employer’[s] confidential information, a restraint clause does not need to be limited to a covenant against disclosing confidential information. It may restrain the employee from being involved with a competitive business that could use the confidential information.

(references omitted)

1. As with most interlocutory assessments of post-employment restraint terms, I readily accepted that an argument might be made that the respondent’s intended acceptance of a role with IOR would amount to a contravention of obligations imposed upon him by cl 7 of his former employment contract. Nonetheless, I considered that such case as might be made was not a strong one. Both of the restraints that the applicant sought to enforce (by interlocutory means) appeared, in my view quite apparently—although I say so only on an interlocutory basis and without needing to decide the point—to trespass beyond what was necessary to protect legitimate commercial interests of the applicant’s.
2. Before explaining why that is so, something should first be said about the extent to which the respondent might be thought to have been privy to, or to have otherwise possessed, relevantly confidential information of the applicant’s. Much of the affidavit material that was received was directed to that question, and to the related question concerning the applicant’s involvement, or intention to become involved, in the market for aviation fuel. The respondent’s evidence (albeit untested at this interlocutory stage) was that the applicant was not involved in the marketing or supply of aviation fuel; and, if it was, that those were functions in which he had no involvement. The applicant, in contrast, maintained that it *was* involved—and intended to expand its involvement—in that market; and that, as a senior employee, the respondent was aware of commercial strategies that were in train to that end.
3. Thus, two very different pictures emerged from the affidavit evidence and that conflict could not sensibly be resolved at an interlocutory stage.
4. It didn’t need to be. Both of the restraints that the applicant sought, by interlocutory means, to enforce appear, on their face, to extend so as to prevent the respondent from undertaking employment regardless of whether he possesses information that might be used to undermine the applicant’s otherwise legitimate commercial interests. In the case of cl 7.1(a) of his former employment contract (above, [11]), the restraint is enlivened not by the respondent’s possession of such information; but by the advantage that it might afford if possessed. Of course, the suggestion was maintained that the respondent did, in fact, possess relevantly confidential information; but the more significant point was that it wouldn’t matter if he didn’t. The clause purports to restrain the respondent from assuming certain roles whether he possesses information of that kind or not. That being so, it purports to restrict him from assuming roles even when his doing so would not jeopardise any legitimate commercial interest that the applicant might wish to protect. In that sense, the clause appears to extend beyond what the authorities recognise as ripe for legitimate or lawful enforcement. The argument to the contrary, whilst open, did not strike me as a strong one.
5. Clause 7.1(e) (above, [11]) is wider still. It purports to prevent the respondent from being concerned or interested in any business activity that is competitive with the applicant. Such a clause, on its face, would restrict activities regardless of whether they have the capacity to inflict relevant harm upon the applicant (for example, it would restrict the respondent from accepting a role wholly different to that which he performed for the applicant). Naturally, it would also serve to protect the applicant in more legitimate ways; but it was not apparent to me how the clause might properly be read down in a way that preserves only that application. The vice that attaches to the provision—I say, again, only for interlocutory purposes—is that its application is unmoored from the protection of legitimate commercial interests of the kind in respect of which the authorities recognise that restraints might lawfully be enforced. Again, then, it appears to extend beyond what the law might validly protect and the contrary contention, though arguable, did not strike me as a strong one.
6. During the course of argument, s 183(1) of the Corporations Act seemed to assume lesser significance. Nonetheless, I should address it. It serves to prohibit the improper use of information acquired by a director or other officer of a corporation. Whether or not that was something that was in prospect here is debateable. I accept (and accepted) that it might be; although I don’t (and didn’t) regard the argument as a strong one. The tendency of the evidence is against the applicant, which is to say that it seems unlikely that the respondent possesses or might have occasion to use information in a manner that offends against s 183(1). Nonetheless, there is evidence tending in the other direction and, at trial, it might prevail. It is possible—although, I consider it unlikely—that the court might accept that there is some risk of improper use of such information. That being so, the applicant has established a prima facie case for relief under the Corporations Act, but only a weak one.
7. I turn, then, to address what the balance of convenience favours. In my view, it tended against the granting of interlocutory injunctive relief. The relief for which the applicant moved would have precluded the respondent from taking up his new role for another month. Although possible, it struck me as inherently unlikely that he might have been able to do much in that time that would visit adverse or significant consequences upon the applicant; and all the more so that he would be able to do much that he wouldn’t be able to do thereafter without restriction. If it transpires at trial that efforts that the respondent was able to mount over the remaining month for which the applicant sought to restrain him were mounted in contravention of the contractual or statutory injunctions upon which the applicant relied, then it is undoubtedly the case that some difficulty will arise at trial in quantifying those impacts. Nonetheless, that difficulty alone is and was not reason enough to favour relief at an interlocutory juncture. Having undertaken not to until the application for interlocutory relief was decided, the respondent had been unable to work in his new role for several months. His evidence was to the effect that that inability posed predictable economic hardship for him and his family. That hardship very much tended against the appropriateness of interim relief.
8. For those reasons, then, the application for interlocutory injunctive relief contained within the originating application of 21 January 2022 was dismissed. It was agreed that the court should reserve the parties’ costs related thereto and, in the absence of some reason not to, that course was accommodated.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Snaden. |

Associate:

Dated: 15 July 2022