Employment, Privacy & Discrimination

Protection for employers against team move (Part I): Non-solicitation clause

Introduction

A "team move" is an expression used to describe the situation in which a number of employees of the same employer resign to work for a new employer. This is in contrast with the departure of a single employee or the departure of more than one employee for different reasons. In this employment newsletter series, we will take a detailed look at how employers can effectively protect themselves against a "team move".

Employers may be able to protect themselves by incorporating a non-solicitation clause in employment contracts. Where a non-solicitation clause is held to be enforceable and an employee is found to be in breach of it, an employer may claim for damages and (in appropriate cases) obtain injunctions. However, in practice, it is not uncommon for the court to find what may appears on the face of it a "standard" or "common" non-solicitation clause unreasonable and strike down the entire clause. In this episode, we will cover a Court of First Instance ("**CFI**") case *Midland Business Management Limited v Lo Man Kui* [2011] 1 HKLRD 470 to illustrate the approach of Hong Kong courts in inquiring into and assessing the reasonableness of a non-solicitation clause in a "team move" scenario.

Background

The Defendant, Howard Lo ("**Howard**"), was a former employee of the 1st plaintiff and was seconded to work at the 2nd plaintiff, Midland Realty International Limited ("**Midland Realty**"). Prior to leaving his employment, he was an assistant sales director in charge of certain real estate agency branches of Midland Realty targeting wealthy home owners.

Immediately after leaving Midland Realty, Howard joined a competitor, Centaline Property Agency Limited ("**Centaline**"). Within less than two months after Howard's resignation, a total of seven estate agents or salespersons of Midland Realty resigned and joined Centaline working under Howard. Midland Realty took the view that Howard had made attempts to deliberately solicit a number of employees to join Centaline and acted in breach of, *inter alia*, the following non-solicitation clause ("**Clause 11.6**") in his employment contract:

> "*11.6 For a period of six (6) months immediately following the termination of this Agreement for whatever reasons, the Employee* ***shall not approach and solicit any other current employee*** *of the Company and/or any member of the Midland Group to join him or other persons in* ***any business undertaking or [of] estate agency*** *in which*

> *the Employee is interested or concerned whether in the capacity as a director, partner, principal, owner, shareholder, consultant, agent, subagent, servant, employee or otherwise.*" (emphasis added)

The plaintiffs applied for an interlocutory injunction to restrain Howard from continuing to act in breach of, *inter alia*, Clause 11.6.

Legal principles regarding the enforceability of post-employment restraints

Regarding the relevant legal principles as to the enforceability of post-employment restraints, the CFI considered the following principles in *Natuzzi SpA v De Coro Ltd* (unreported, HCA 4166/2003, 16 June 2006), paras.44-61:

> "*(a) No employer is entitled to make use of a restrictive covenant to protect himself against competition per se. A covenant against competition per se is not reasonable and accordingly void;*
>
> *(b) An employer is not entitled to prevent his ex-employee from using the skill and knowledge in his trade or profession which he learnt in the course of his employment. Nor is he entitled to prevent his ex-employee for using in the service of some person other than the employer the general knowledge the employee has acquired of the employer's scheme of organisation and methods of business;*
>
> *(c) An employer is entitled to make use of a restrictive covenant to protect his legitimate interests such as his trade secrets and his trade connections. However,* ***the restrictive covenant, to be valid, must afford no more than adequate protection to the party in whose favour it is imposed. It must be reasonable not only in reference to the interests of the parties concerned, it must also be reasonable in reference to the interests of the public****;*
>
> *(d)* ***The onus of proving the reasonableness of the restriction rests on the party who seeks to enforce the restriction. The more onerous the restriction, the heavier the weight of the onus.***" (emphasis added)

The CFI's decision

Issue (1): Was Clause 11.6 an unreasonable restraint of trade?

At the outset, the CFI applied the legal principles set out in the leading case *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and considered that for the plaintiffs' application for an interlocutory injunction to succeed and bearing in mind that it was unlikely that the trial

of the plaintiffs' action could take place before the expiry date of Clause 11.6, the plaintiffs have to demonstrate a good prospect of success for their application.

The CFI held that the plaintiffs did not have a good prospect of success in enforcing Clause 11.6 in its current form on the basis that it was an **unreasonable restraint of trade** and, therefore unenforceable. For the expression "*any other current employee*", its natural meaning in the context of Clause 11.6 covered all employees of the plaintiffs when Howard approached or solicited them regardless of their importance, and included non-sales staff and staff who had joined the plaintiffs after Howard's resignation.

As for the expression "*any business undertaking of estate agency*", those who join in any business undertaking of estate agency can serve different functions and can include administrative staff working for the plaintiffs, who are neither estate agents nor salespersons. No express qualification as to the subject of approach or solicitation was present other than being a "*current employee*" of the plaintiffs. Therefore, the CFI took the view that administrative staff of the plaintiffs would be caught within the scope of Clause 11.6 as a matter of construction and that the expression "*any business undertaking of estate agency*" failed to confine the operation of Clause 11.6 to estate agents or sales staff only.

Upon holding that Clause 11.6 was indiscriminate in its range, the CFI held that the plaintiffs were unable to explain what legitimate interest they had in preventing non-sales staff from being solicited and therefore, an indiscriminate anti-poaching restraint could not be justified.

Issue (2): Will the court re-draft Clause 11.6 to make it enforceable?

Another issue discussed in this CFI case is whether wordings may be added or modified in Clause 11.6 in order to make it enforceable for the parties. The CFI held that it is not the function of the court to re-draft restrictive covenants for the parties and cited the following paragraph in *Chitty on Contracts*, 30th Edition, Volume 1, paras. 16-105:

> "*The court will not imply a term in order to save a covenant restraining an employee's post-employment conduct.* ***Nor will the court re-write a covenant in restraint of trade where the contract provides that the covenant, if unenforceable, should be rewritten with such minimum amendment as renders it enforceable.***" (emphasis added)

Conclusion

It is important for employers to bear in mind that the court will not "fix" an unenforceable non-solicitation clause, and that an indiscriminate non-solicitation clause is likely to be unenforceable. This CFI decision serves as a good reminder for employers that when drafting a non-solicitation clause to protect themselves against "team move", narrower is

often better. In particular, express qualification as to the subject of solicitation should be added to the clause. When employers seek to enforce a non-solicitation clause in court, the court will closely examine its wordings as a matter of construction. It will require employers to pinpoint what exactly is the legitimate business interest that requires protection and to provide evidence to justify the scope and period of any restraint they seek to enforce.

Therefore, in order to minimize the risk relating to enforceability of non-solicitation clauses, employers should seek assistance from their legal advisers to draft or review such clauses.

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