

Employment, Privacy & Discrimination

Protecting the Employer's Interests by Post-termination Restrictions in Employment Contracts – How Effective?

Introduction

Employment contracts for senior employees may contain post-termination restrictions. Such terms are intended to prevent former employees from gaining an unfair competitive advantage against their former employer. For instance, they may be prohibited from being employed by the former employer's competitors and doing business with the former employer's customers.

Injunction against former employee for breach of the post-termination restrictions

Companies may apply for an injunction against their former employees if they breached the post-termination restrictions. As post-termination restrictions may prevent individuals from earning a living by using their skills and experience, the Court will uphold restrictive covenants only if they are reasonable and no wider than necessary to protect the former employer's legitimate interests.

Recently, the Court of First Instance in *GFI (HK) Securities LLC v Gyong Hee Kang & ICAP Equities Asia Limited* HCA 1319/2015 granted an injunction against the former employee of GFI (HK) Securities LLC (“**GFI**”) in relation to the post-termination restrictions on dealing with GFI's clients and soliciting business from GFI's clients (“**GFI Case**”).

Brief facts of the GFI Case

1. The Plaintiff, GFI was the former employer of the 1st Defendant, Gyong Hee Kang.
2. The 1st Defendant was employed by GFI as a “senior broker and head of Korea fixed income”. She was employed on an annual basic salary of US\$250,000 and was eligible for a discretionary bonus, which was US\$85,750 in 2014. She was employed by GFI since September 2009. Subsequently, she signed a fixed term contract with GFI which commenced from 1 July 2015 until 30 July 2017.
3. The 2nd Defendant, ICAP Equities Asia Limited (“**ICAP**”) is the new employer of the 1st Defendant.

4. The 1st Defendant's employment contract contained post-termination restrictions which included the following terms:
 - (i) *“Non-deal: for 6 months immediately after the termination of the contract not to accept or facilitate the acceptance of orders or instructions from any person who in previous 12 months had been a client (of GFI);*
 - (ii) *Non-solicit: for 6 months immediately after termination of the contract not to directly or indirectly canvass or solicit business from any person who was a client of GFI in the previous 12 months, nor to accept or facilitate the acceptance of orders or instructions from any such client.”*
5. On 17 February 2015, the 1st Defendant resigned from her employment with the Plaintiff and made payment in lieu of her employment in the sum of US\$591,781.07.
6. The 1st Defendant was reminded in writing by the Plaintiff of the post termination restrictions on 17 February 2015.
7. On 18 May 2015, GFI found out that the 1st Defendant was employed by ICAP.
8. On 19 May 2015, GFI's lawyers wrote to 1st Defendant and ICAP to remind them of the post-termination restrictions and to give them notice that it intended to take actions to protect its interests.
9. On or about 27 May 2015, GFI found out that the 1st Defendant had been in contact with GFI's clients in Korea with whom she had previously dealt with and/or served.
10. On 16 June 2015, GFI applied for injunctive relief against the 1st Defendant. The relief sought included the following:

“Until 17th August 2015 or such earlier time as the Court may order, the 1st Defendant be restrained from:

 - (i) *soliciting business from any person who was a Client (as stated in the list provided by GFI); and*
 - (ii) *accepting or facilitating the acceptance of orders or instructions or having any business dealings with a Client (of GFI).”*

Issues considered by the Court

In considering whether to grant an interlocutory injunction against the 1st Defendant, the Court considered various issues which include:

1. Whether GFI would be adequately compensated by damages for any loss caused by a refusal to grant an interlocutory injunction. In other words, if damages for GFI are appropriate remedy, there can be no injunction.
2. GFI's prospects of success at the trial (there cannot be a trial within the remaining 8 weeks of the restraint).
3. The enforceability of the post-termination restraints.
4. The evidence substantiating the breaches on the part of the 1st Defendant.

Whether damages will be adequate?

If the 1st Defendant is free to trade upon the valuable connections with GFI's clients, GFI is at risk of losing those connections. In this respect, the Court found it difficult to see how damages for GFI might be assessed.

On the other hand, if the injunction is wrongly imposed on the 1st Defendant, she can be adequately compensated by damages. Moreover, GFI was willing to fortify that by paying a sum equivalent to 2-month wages of the 1st Defendant. Therefore, the Court found that the balance of convenience clearly lay in the favour of GFI.

Whether the post-termination restrictions are enforceable?

The enforceability of the post-termination restrictions depends on various factors, including the following:

1. The meaning of the post-termination restrictions.
2. Whether the legitimate interests of the plaintiff required the protection by a post-termination restriction.
3. The reasonableness of the restrictions.

In the GFI case, the Court took the view that the terms of the post-termination restrictions were plain and unambiguous. GFI had a reasonable prospect of success in its contention that it had legitimate interests to protect by the restrictions. Its interests in relation to

customer connections, confidential information are valid and legitimate commercial interests justifying the restrictions.

The 6-month of restriction is necessary to replace departed employee, for the new employee to build up trade connections and for any confidential information to become outdated. Moreover, the Court was satisfied that GFI had a reasonable prospect of success in establishing that the 1st Defendant was sufficiently senior to justify the restrictions imposed.

In view of the above, injunction against the 1st Defendant was granted.

Conclusion

In order to protect the interests of the employer, post-termination restrictions (in clear and unambiguous terms) shall be included in the employment contract for senior employees. However, such restrictions must be reasonable and no more than necessary to protect the legitimate interests of the employer. The scope, duration and the applicable places/countries of the restriction shall also be reasonable with reference to the duties and responsibility of the employee concerned. Moreover, if any breach of the post-termination restrictions is found, legal action (such as an application for an injunction) shall be instituted swiftly.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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